74-1532

Supreme Court U. S.
FILED
JUN 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. A-812

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, et al, Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

(Two Volumes)

RICHARD ANTHONY JOHNSON
132 South Central Ave.
Suite 7
Phoenix, Arizona 85004

Counsel for Petitioner

VOLUME I

Pages 1 - 87

INDEX

Volume I

	Page
Complaint, filed Jan. 14, 1974.....	1
List of exhibits to complaint.....	53
Agreement (contract & escrow instructions), Oct. 9, 1968.....	54
Retyped fine print instructions.	58
Schedule "A".....	73
Legal description.....	77
Trustee Banks' escrow instructions (Oct. 25, 1968).....	80
F. M. Cocke's deeds, Dec. 30, 1968...	81

Volume II

F. M. Cocke's Notice of intent to cancel, Mar. 5, 1969.....	88
Escrow agent's Notice thereof to Buyer's, Mar. 6, 1969.....	90
Buyers' letter of new demands, received by escrow agent Mar. 7, 1969.....	91
Escrow agents' notice to sellers that Buyer had complied, Mar. 10, 1969..	95
Agreement between Buyers', Joan Cocke and Transamerica that Buyers' were depositing additional funds to comply, Nov. 27, 1972.....	96
Buyers' letter to Transamerica demanding compliance by it, following Buyers' deposit in early Jan., 1973 of additional funds, Aug. 29, 1973.....	99
Summary Judgments in favor of Transamerica, Nov. 10, 1970.....	102
Judgment in favor of Joan H. Cocke, Nov. 1970.....	106

	Page
Buyers' Amended Proposed Findings and Conclusions, July 26, 1972.....	110
Judgment in fabor of Buyers', Sept. 27, 1972.....	116
Buyers' Application for Writ of Assistance, filed Sept. 7, 1973....	130
Order Granting Writ of Assistance, entered Oct. 31, 1973.....	146
Writ of Assistance, etc., entered Oct. 31, 1973.....	153
District Court's Memorandum and Order, Mar. 4, 1974.....	157
District Court's Judgment, Mar. 4,1974.....	163
Judgment (order)of Ninth Circuit, Oct. 7, 1974.....	164
State Trial Court's Order Approving Account of Court-appointed Officer, etc., entered Sept. 30, 1974.....	165

CROSS INDEX

TO REFERENCES IN PETITION

Record Page	Appendix Page
43	54
48	62
54	73
63	90
72	102
75	106
78	110
83	116
91	127
92	128
105	146
111	153
645	157

FRANCIS M. COCKE, Plaintiff
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

In propria persona

Filed:
January 14, 1974

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE, Plaintiff, vs. IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. DONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Defendants.	CIV 74-20 PHX WPC COMPLAINT FOR RELIEF FROM STATE COURT JUDGMENTS AND ORDERS ENTERED WITHOUT JURISDICTION, AND FOR INJUNCTION AND DAMAGES

I.

PRELIMINARY STATEMENT OF
PLAINTIFF'S CAUSE OF ACTION

On October 9, 1968, plaintiff F. M. Cocke and Joan H. Cocke (divorced) as Sellers entered into a written agreement with James Stewart Company or its nominees as Buyers, for the sale and purchase of two parcels of land under the terms set forth in written escrow instructions to Transamerica Title Insurance Company of Arizona, as Escrow Agent and Title Insurer. Inasmuch as Transamerica remains unwilling to issue its title policies and close the escrow in accordance with new demands [2] made by Buyers, as well as unwilling to return Sellers' deeds following repudiation or cancellation of the escrow agreement, there has been no transfer of title or change in possession under its terms. Title to an undivided half-interest in Parcel 1 was and is held by First National Bank of Arizona as trustee, and its additional escrow instructions were deposited into escrow on or about October 25, 1968, along with its deed, and were accepted by all parties as part of the escrow instructions agreed to as constituting the terms of deposit of Sellers' three deeds. Joan H. Cocke is life tenant of the trust. A copy of the agreement and of the trustee Bank's additional instructions are attached hereto as Exhibit A. The fine print escrow instructions on the back of Transamerica's printed escrow form have been retyped to more legible size. F. M. Cocke's deed to his undivided half-interest in Parcel 1 and his deed to his Parcel 2, copies of which are attached as Exhibit B, were deposited into escrow by the broker on or about December 31, 1968, following a survey to determine the exact metes and bounds of each of the two Parcels.

Following the deposit of the trustee Bank's deed, Joan H. Cocke, James Stewart Company with its nominees M. Seth Horne and Maurine D. Horne as Buyers, and Transamerica, attempted by joint and several activities to bring about substantive alterations in the escrow instructions, and joined in concerted attempts to mislead and to coerce F. M. Cocke into submitting to such alterations. Each of such three parties in a separate suit in Civil Case No. C-222472 in Maricopa County Superior Court sought and obtained through an attorney at law the entry of a separate judgment and decree against F. M. Cocke. Each of these judgments in intent, substance and effect does unlawfully alter or delete at least one of the controlling terms of such escrow instructions, without jurisdiction in the court. The entry of such judgment [3] has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of the concerted attempts by such other three parties to mislead and to coerce him into submitting to such alterations.

Subsequently, the state trial court judge and two appellate court judges entered orders in aid of carrying such unlawful alterations into effect. By the entry of each such order the judge has deprived F. M. Cocke of a right, privilege or immunity secured to him by the federal constitution and laws, in furtherance of such concerted attempts to mislead and to coerce him into submitting to the alterations. By wrongfully using the coercive power of the State of Arizona in aid of carrying such unlawful alterations into effect, each of such judges in furtherance of such concerted attempts has joined in an attempt, by unlawful threat of force to be applied under color of official right, to extort from F. M. Cocke his consent to such unlawful alterations, so depriving him

of a right, privilege or immunity secured to him by the federal constitution and laws, and obstructing the due course of justice in the courts of the State of Arizona.

Under pretense and color of state law and authority, such other parties to the agreement, their attorneys at law, and the three judges by joint and several action with discriminatory intent and purpose have subjected or caused to be subjected plaintiff F. M. Cocke to the deprivation of equal rights, privileges and immunities secured by the constitution and laws of the United States to a citizen thereof, including deprivation of his right to like access to the courts of the State of Arizona for the protection of property, the prevention and redress of wrongs, and the enforcement of contracts. Plaintiff has been deprived of his civil rights to equal protection of the laws and due process of law guaranteed by the 14th Amendment to the federal [4] constitution. By such deprivations plaintiff has been damaged by way of harassment, extra expense, the direct taking of his time, and delay in making higher and better use of his land.

II.

JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1331, since federal questions are involved in this action, and under 28 U.S.C. §1343, since plaintiff's rights, privileges and immunities under the laws and Constitution of the United States have been denied under color of state law. Plaintiff's cause of action arises under such laws and Constitution and under the equal protection and due process clauses of the 14th Amendment. Statutory foundation

for plaintiff's suit may be found in 42 U.S.C. §1981, 1982 and 1983, since defendants' conduct denies plaintiff's federal statutory and constitutional rights, and 42 U.S.C §1985, since defendants' joint conduct amounts to conspiracy, and 42 U.S.C. §1986, since each of the defendants neglected or refused to prevent the offending conspiratorial conduct, and 42 U.S.C. §1988, with respect to proceedings in vindication of civil rights.

III.

THE PLAINTIFF

Plaintiff F. M. Cocke is and has been for more than sixty-five years a citizen of the United States and a resident of Maricopa County, and is and has been for more than twenty-five years the owner of Parcel 2, and the owner of an undivided half-interest in Parcel 1, and the farmer of both parcels.

The duties assumed by F. M. Cocke under the agreement and escrow instructions, as spelled out on page 1 and by paragraph 1 of the fine print, were to deposit good and sufficient deeds into escrow and to sign the mortgage releases when prepared and delivered into escrow by Buyers. These things he timely did. [5]

Fine print paragraph 14 places on the Escrow Agent, not on F. M. Cocke, the duty to close the escrow "when these instructions have been complied with." The quoted clause includes compliance by the Buyers and Transamerica as escrow agent and title insurer as well as by F. M. Cocke. On March 10, 1969, following Buyers' delivery into escrow of a number of new written demands, the escrow agent formally notified Sellers by mail that Buyers had done everything required

of them to close the escrow. However on November 27, 1972, Transamerica, Hubert Kelly for the Buyers, and Loretta Whitney for Joan H. Cocke, entered into a written agreement that Buyers had not yet complied with the October 9, 1968, agreement, and would deposit additional funds into escrow to cover the deficiency. The judgment in favor of Buyers, September 27, 1972, assessed more than $47,000 in damages against F. M. Cocke on Buyers' claim that he was the one who had delayed close of escrow. The trial court judge ignored F. M. Cocke's timely request for findings on what act or failure to act by him caused the delay.

F. M. Cocke's Parcel 2 as described in his deed was necessarily subjected to the Notice of Lis Pendens filed by the State of Arizona in its eminent domain action against him. Such action was filed in late 1965, and was not settled until early 1970, at which time the State gave up its attempt to take a 20-foot strip of land out of Parcel 2 without payment. The State attempted to establish that the south boundary of Parcel 2 was 27-1/2 feet north of the centerline of the Jenkins Ditch, a large drainage canal which borders the south boundary of Parcels 1 and 2 and provides drainage. In order to establish such south boundary at its true location, and so reduce the area the State was taking without payment, F. M. Cocke had the canal right of way surveyed and marked. The surveyor had previously surveyed Parcels 1 and 2, and designated the canal right of way as Parcels [6] 1A and 2A. Transamerica and the Buyers were advised of the dispute and were furnished copies of the surveys of all parcels by the surveyor in December, 1968. Some fifteen months later the State, after changing its land descriptions several times, finally amended to agree with the 1892 grant of right of way for the canal, with the

subsequent prescriptive use of the canal north of the grant, and with the survey, which placed the boundary line at the north water edge of the canal, some 20 feet farther south than originally claimed.

As more particularly hereinafter set forth, in significant time sequence, Buyers and Transamerica joined in two attempts to obtain F. M. Cocke's signature to warranty deeds which included Parcels 1A and 2A, in addition to Parcels 1 and 2, although the right of way of the Jenkins Ditch was specifically excluded from the land descriptions made a part of the October 9, 1968, agreement and instructions, and was not the subject of any additional contract. The Cockes, and therefore the trustee Bank, had never acquired title to the canal right of way, although it was within their fence lines. Transamerica also attempted, as also discussed below, to establish that F. M. Cocke was in default because the surveyor had included as part of Parcel 2 a small triangle of land, about 65 square feet, not yet taken by the State at the time of his survey and description of Parcel 2. This is the Brown Engineering Company's description, which was copied into F. M. Cocke's deed to Parcel 2. However, the purpose of the Notice of Lis Pendens was to notify all interested parties that the State was lawfully taking from F. M. Cocke's property rights, including his rights in Parcel 2, as much as was needed for public use but only as much as the public was willing to pay for. The attorney who represented the State in its eminent domain case, Maricopa County No. 183278, against F. M. Cocke, was a law partner of Transamerica's attorney in C-222472. [7]

IV.

THE DEFENDANTS

1. THE PARTIES TO THE AGREEMENT, AND THEIR LAWYERS.

(1) THE ESCROW AGENT AND TITLE INSURER.

Transamerica Title Insurance Company of Arizona, an Arizona corporation, accepted the escrow instructions as the terms of deposit of Sellers' three deeds, and so assumed the duties to comply with such instructions as escrow agent and as title insurer. However, its assumption of duties as indicated on the face of its printed escrow form was subject, among other things, to paragraphs 24 and 43 of the fine print instructions on the back.

Cancellation paragraph 24 specifies that if the escrow agent, either because it is unable or unwilling, fails to comply with the escrow instructions, or escrow agreement (unless already cancelled under paragraphs 16-18 by failure of Seller or Buyer to comply), the escrow agreement is thereby ended. The escrow agent is directed to collect the charges and return any extra money to the depositors thereof, and the deeds are to be returned to the parties who executed same. The unwillingness of Transamerica to issue any title policy provided for puts an end to the agreement in the same manner as the failure of the escrow agent to comply with the instructions. Such end of the agreement is independent of compliance by Seller and Buyer, and requires no notice to or by any party.

Paragraph 43 provides, simply and effectively, that "Close of Escrow" shall mean

the date of the policy of title insurance to be issued. In other words, the escrow cannot close unless and until Transamerica guarantees the titles in the Buyer. As briefly stated in Higgins v. Kittleson (1965), 1 Ariz. App. 244, 401 P.2d 412:

> [8] The law is well settled that an escrow agent acts in a fiduciary capacity and must conduct affairs with which he is entrusted with scrupulous honesty, skill, and diligence. Tucson Title Ins. Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963). That he (Escrow Agent) is a trustee and must act in accordance with terms of the escrow agreement. Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953). And that if he (Escrow Agent) delivers a deed in violation of the terms of deposit that the deed conveys no title to grantee. Hixon v. Davis, 46 Ariz. 543, 52 P.2d 1166 (1935), D'Ascoli (supra).

Under these conditions, the unwillingness of Transamerica to issue a title policy insuring the grantee's title could stem from any failure of the escrow agent or of a buyer to comply with the escrow instructions which constitute, as here, the terms of deposit of a seller's deed, as well as from a defect in such deed or in the title to the land described therein.

In the proceedings leading to the separate judgments in C-222472 in favor of Transamerica, and in F. M. Cocke's appeals from such judgments, Transamerica has been represented by Powell B. Gillenwater as its attorney at law.

(2) THE BUYERS

James Stewart Company is an Arizona corporation engaged in the construction business and in the development of land. M. Seth Horne is president of the company. He and his wife, Maurine D. Horne, were named as nominees by the Company acting by its president. Wallace O. Tanner signed the agreement and escrow instructions for the Buyers as vice president of the Company. He also acted in the capacity of attorney at law in C-222472 for the Company and the Hornes until replaced in such representative capacity by Hubert E. Kelly and Steven H. Schneider.

On March 5, 1969, at Transamerica's office, the escrow officer handed to F. M. Cocke for his signature a stack of documents. He signed the 25 mortgage releases, but refused to sign the document on the bottom of the stack. This was the warranty deed which included Parcels 1A and 2A, in addition to Parcels 1 [9] and 2, referred to above beginning at page 6, line 10. Upon questioning, the escrow officer stated that such deed had been prepared and deposited into escrow by the Buyers, with the verbal instruction that F. M. Cocke's signature was to be obtained thereon. Since F. M. Cocke's deeds had been in the escrow file for more than two months, he signed and delivered into escrow, on a printed form furnished by the escrow agent, a 13-day notice of intent to cancel upon the continued failure of the Buyers to comply, and then left the office. As later alleged by Buyers in their pleadings, the escrow agent by telephone then reported the failure to obtain the signature to Wallace Tanner, who prepared a second spurious deed, without Parcels 1A and 2A, for F. M. Cocke's signature. A copy of this No. 2 spurious deed was attached to Buyers' complaint of April 22, 1969, as evidence that F. M. Cocke had

refused to execute the deed required to be executed by him. As evidence that he had also refused to execute the mortgage releases, Buyers attached 25 unsigned copies, apparently of the 25 originals that F. M. Cocke had signed on March 5, 1969. The trial court judge made no findings on the falseness of such claims or such evidence, despite F. M. Cocke's protests.

Copies of F. M. Cocke's notice of intent to cancel, and of the escrow agent's notice thereof to Buyers are attached as Exhibit C. The former specified that personal checks were not acceptable as payments under a cancellation notice.

On March 7, 1969, the escrow agent received Buyers' letter of new instructions and demands, enclosing two personal checks for $32,000 each, dated March 7, 1969, and Buyers' notes and mortgages totalling about $420,200. A copy of Buyers' letter, and of the escrow agent's notice that Buyers had so complied, are attached as Exhibit D. It has not been disputed that Buyers' new instructions directed the escrow agent to:

[10] ITEM 1. Close the escrow with payment of about $120,000 in trust land proceeds to be made to life tenant Joan H. Cocke, contrary to the trustee Bank's escrow instructions.

ITEM 2. Close the escrow and record the trustee Bank's warranty deed to Buyers, subject to a mortgage to be simultaneously recorded for $32,000 less than the balance due.

ITEM 3. Close the escrow and record F. M. Cocke's warranty deeds to Buyers, subject to mortgages to be simultaneously recorded for $52,000 less than the balance due.

ITEM 4. Close the escrow and record warranty deeds to Parcels 1A and 2A to Buyers.

ITEM 5. Accomplish Items 1 through 4 before turning over to Sellers the two personal checks for $32,000 each, as the annual payment due January 2, 1969.

As mentioned above at page 5, line 5, on March 10, 1969, the escrow agent notified Sellers by mail that by such instructions, documents and demands the Buyers had done everything required of them to close the escrow. In view of Buyers' demand that the $64,000 represented by the two personal checks was not to be paid unless and until the warranty deeds included deeds to Parcels 1A and 2A, the escrow agent's notice to Sellers, which amounted to notice that the additional deeds were required by the escrow instructions earlier agreed to, was its second fraudulent attempt to secure warranty deeds to Parcels 1A and 2A, the first having failed five days earlier. Had either of these attempts succeeded, the close of escrow would have been delayed pending successful conclusion of a quiet title suit by the person who signed such deed against the heirs of B. J. George, whose name does not appear in the chain of title, at least to Parcel 2, after 1903. This would have effected a saving to Buyers of about $85 per day in interest charges, and a windfall for the escrow agent in its free use of funds already on deposit, [11] under fine print paragraph 12.

On March 20, 1969, the escrow agent advised F. M. Cocke that his notice of intent to cancel was ineffective because he was himself in default because Transamerica was unwilling to issue its title policy on Parcel 2 as described in F. M. Cocke's

deed. Transamerica based its announced unwillingness on its unsupported and unsupportable claim that F. M. Cocke had been divested of his earlier title to a tiny triangle of land worth about $6.00, mentioned above at page 6, line 19, by a neighbor's 1965 corrective quit-claim deed to the State of Arizona, in connection with its acquisition of highway right of way on the other side, the south side, of the Jenkins Ditch. The State, although named grantee in the neighbor's deed, made no claim of title thereunder, as shown by the record in the eminent domain case.

One of the games being played with Buyers' March 7, 1969, written demand for the inclusion of Parcels 1A and 2A into the deeds, with the March 10 written acceptance and approval of such demand by the escrow agent, and with the March 20 statement by the escrow agent before a witness that Transamerica was unwilling to insure title to Parcel 2 as described in F. M. Cocke's deed, was to mislead and coerce him into signing a new deed. The March 19 deadline for compliance by Buyers, specified by the escrow agent's written cancellation notice to Buyers on March 6, 1969, had passed, and unless Buyers and the escrow agent could establish that F. M. Cocke was himself in default when he filed his notice of intent to cancel, the agreement had already come to an end. F. M. Cocke's signature to any sort of corrective deed would admit that the earlier deed was in fact defective, that his notice of intent to cancel was therefore ineffective, and that the agreement was not cancelled even though Buyers had not complied. (This would not affect its repudiation.)

However, this concerted attempt did not succeed, since [12] F. M. Cocke signed no

new deeds. The concerted attempt may explain why, when Buyers moved the controversy to the state courts, about a month later by filing their Complaint For Specific Performance of the agreement and escrow instructions, they named as defendants only the Sellers, and have never joined Transamerica either as escrow agent holding the deeds or as title insurer. The failure of such attempt may explain the otherwise unexplainable claims made by Buyers in their Complaint, mentioned above at page 9, line 13, that F. M. Cocke had refused to execute the required deed and mortgage releases, and Buyers' submission of the unsigned copies of the No. 2 spurious deed and the second set of releases, as exhibits. F. M. Cocke's signature on a set of corrective releases, particularly if he had signed the first set on November 5, 1968, before the survey, as alleged by Transamerica in a pleading verified by the escrow officer, would serve the same purpose as a corrective deed. The possibility of curing Buyers' cancellation of the agreement by this scheme may explain attempts made by Buyers, with the apparent aid of a judge, to persuade F. M. Cocke to settle the dispute by the seemingly harmless signing of the new deed or the new releases.

On April 2, 1969, Wallace Tanner filed for record a copy of the Agreement and escrow instructions of October 9, 1968, in the office of the Maricopa County Recorder. Subsequent tax bills add James Stewart Company as an owner.

(3) THE LIFE TENANT

Joan H. Cocke signed the agreement and escrow instructions as life tenant of the trust of which First National Bank of Arizona is managing trustee. Joan H. Cocke is and

has been for many years under constant treatment for alcoholism. She was represented in the making of the agreement and escrow instructions, and the agreement as to the trustee Bank's instructions, and in C-222472, solely by Loretta S. Whitney, as her attorney at law. [13]

On October 10, 1968, by letter prepared by attorney Whitney, F. M. Cocke and Joan H. Cocke jointly directed the trustee Bank, as authorized by the trust agreement, to deposit into escrow its deed to the half-interest in Parcel 1 held by it, along with specific escrow instructions: first, that the sale was to be consummated in accordance with the instructions already agreed to by all parties, which included the cancellation provisions, and second, that the proceeds of sale of the trust land were to be disposed of as further instructed by F. M. Cocke and Joan H. Cocke.

The trustee Bank deposited its escrow instructions as directed, but along with a deed to the whole of Parcel 1 instead of the half-interest held by it, which deed it refused to correct. It appears that because of this spurious deed attorney Whitney was subsequently able to obtain a judgment that the proceeds from the trust half-interest in Parcel 1 were to be paid to Joan H. Cocke, alone, free of trust. Being aware that F. M. Cocke was to be paid for his half-interest (none of his land has ever been in a trust), trial court judge Jack D. H. Hays on December 31, 1968, plausibly ruled that Joan H. Cocke was entitled to be paid for the other half, since according to the spurious deed both half-interests were held in trust.

However, unless it be established that the various state courts had jurisdiction in C-222472 to delete the cancellation

provisions from the escrow agreement, and to delete from the record Buyers' letter of new demands received by the escrow agent on March 7, 1969, along with the escrow agent's letter of March 10, 1969, notifying Sellers that by such new demands Buyers had complied with the escrow agreement, it also appears that the question of the disposition of the trust land proceeds is moot. There are to be no such proceeds because the agreement came to an end in March, 1969, by repudiation or cancellation in accordance [14] with paragraphs 18 or 24, and the trustee Bank's deed must therefore be returned to it, as specified by the cancellation provisions. Without more, this is established by the written agreement of November 27, 1972, mentioned above at page 5, line 9, between Hubert Kelly for Buyers, Loretta Whitney for Joan H. Cocke, and Transamerica, that Buyers had not yet complied with the October 9, 1968, agreement. Further, by letter to Transamerica dated August 29, 1973, Buyers demanded that Transamerica comply with the judgment of September 27, 1972, against F. M. Cocke, alone, obtained by Buyers in their suit for specific performance of the escrow agreement, in which Transamerica was never joined. In the letter Buyers reminded Transamerica that in a meeting in its office in early January, 1973, Buyers and Transamerica agreed between themselves that Buyers had not yet complied with the agreement and escrow instructions of October, 1968. Copies of the November 27, 1972, agreement, and of Buyers' letter of August 29, 1973, are attached as Exhibit E. As established by their letter of August 29, 1973, Buyers deposited additional funds in order to attempt to comply in January, 1973: with the October, 1968, escrow instructions; with F. M. Cocke's March 5, 1969, written 13-day notice of intent to cancel upon Buyers' continued failure to comply; with

the escrow agent's March 6, 1969, written notice to Buyers that they must comply by March 19, 1969; with the escrow agent's March 10, 1969, written notice to Sellers that Buyers had complied; and with Buyers' own letter of March 26, 1969, to Transamerica affirming that all requirements on the part of the Buyers had been fully performed.

(4) THE BROKER

Arleigh H. Burton signed the escrow instructions as the real estate Broker. He has taken no position in the controversy in the state courts except to testify by depsition. Fine print [15] paragraph 23, which provides benefits for a broker, was superseded by the sixth paragraph ofSchedule "A", a part of the escrow instructions. Arleigh R. Burton is named as a nominal defendant herein to afford him proper notice in the event he should choose to join in this suit.

2. THE JUDGES

(1) IRWIN S. CANTOR, acting as the judge of the Superior Court of Arizona, in and for the County of Maricopa, in Civil Case No. C-222472, has entered judgments and orders without jurisdiction in the court.

The litigation in the state courts began in April, 1969, when Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions against only Sellers. F. M. Cocke along with his answer counterclaimed against Buyers, against Transamerica as an additional defendant on his counterclaim, and crossclaimed against Joan H. Cocke, all as joint as well as several defendants indispensable to an adjudication of the rights and

obligations arising under the single contract entered into. However, the judge on Transamerica's motion ordered F. M. Cocke's claims separated by amendment into three separate claims, against each instead of all of the other parties to the agreement, over F. M. Cocke's objections. The judge thereafter dealt with the separated claims as separate and independent controversies arising from separate and independent causes of action, and eventually entered separate and independent judgments against F. M. Cocke. Each of these three judgments, in order to grant the relief sought by one of such three other parties, decisively altered the escrow instructions. Copies of the three judgments are attached hereto as Exhibit F. F. M. Cocke did not amend as to Joan H. Cocke, her claim to the trust land proceeds appearing by that time to be moot. Buyers had already answered the original counterclaim, and were basing [16] their defense on the unsupportable claims that F. M. Cocke had refused to execute the deed and mortgage releases required to be executed by him, the same as in their complaint.

(2) EINO M. JACOBSON, acting as a judge of Department B, Division 1 of the Arizona Court of Appeals, has entered orders without jurisdiction in the court, in an appeal in C-222472.

F. M. Cocke appealed from the early separate summary judgment of November 10, 1970, in favor of Transamerica on its counterclaim for attorney fees by the enforcement of only fine print paragraphs 8, 9 and 10. Subsequent to the filing of the briefs, F. M. Cocke sought by special action the dismissal of Transamerica's suit against him, on the ground that the trial court, and therefore the appellate courts, were without jurisdiction in the absence of the

Buyers. F. M. Cocke also sought stay of the proceedings on his claims against Transamerica until his claims against Buyers, as indispensable parties, could be brought before that court.

However, Department B threatened sanctions for bringing a frivolous special action, and after a recess denied all relief. Wallace Tanner, attorney for Buyers, and several members of the staff of James Stewart Company were present at the hearing, although Buyers still maintain that there was no connection between them and Transamerica in C-222472. During the recess immediately following the threat, Wallace Tanner urged immediate settlement. With Eino Jacobson writing, the judgment awarding the attorney fees was affirmed. The issues of whether the agreement had been repudiated or cancelled, so putting an end to Transamerica's and Buyers' rights thereunder, before the attorney fees were incurred, were avoided by substitution of seven questions apparently framed by the writer for the questions actually presented for review by F. M. Cocke's opening brief. The documentary evidence, presented to the Court of Appeals by reference [17] in the brief to specific pages of the abstract of the record, was ignored, as in the trial court. The Court of Appeals' decision is reported as Cocke v. Transamerica (March, 1972) 16 Ariz. App. 556, 494 P.2d 756. In Balitimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S.Ct. 797 (1936), the court said at L.ed 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right

to introduce evidence and have judicial findings based upon it.

(3) FRANCIS J. DONOFRIO, acting as a judge of Department A, Division 1 of the Arizona Court of Appeals, has entered orders without jurisdiction in the court, in an appeal in C-222472.

Following entry in the trial court on September 27, 1972, of the separate judgment in favor of Buyers, F. M. Cocke timely filed a motion to vacate, for want of jurisdiction over the subject matter, that judgment and the Transamerica judgment as increased to $8,364.24 by the trial court judge after remand. The motion to vacate was denied November 6, 1972. The issues of whether the agreement had been repudiated, or cancelled by the failure of Buyers or the escrow agent to comply or the unwillingness of Transamerica to issue its title policy, had still not been ruled on by any court. The documentary evidence, including the agreement and escrow instructions, and Buyers' letter of new demands in violent conflict therewith, was still ignored. On January 4, 1973, F. M. Cocke filed notice of appeal from the two judgments and from the order of November 6, 1972, denying the motion to vacate same. Rule 73(b) as amended, 16 ARS Rules of Civil Procedure, allows sixty days to file notice of appeal, which time commences to run from denial of a motion to vacate, unless such motion does not qualify as a Rule 59(l) motion to alter or amend.

Arizona adopted as its Rule 59(l) the present Federal [18] Rule of Civil Procedure 59(e). Moore's Federal Practice at Volume 6A, page 59-250 (earlier edition p. 3880), says:

> Although the motion under (e) is to "alter or amend" the judgment, it would perhaps be more accurate to say that subdivision (e) deals with motions to alter, amend, or vacate. . . .The cases have wisely recognized the power of the court to vacate and set aside a judgment under 59(e).

Volume 3, Federal Practice and Procedure, Rules Edition, Barron and Holtzoff, in §1308, page 387, discusses Federal Rule 59(e). Note 84.1 includes:

> A motion to set aside a judgment is one to alter a judgment under Rule 59(e). . . .Steward v. Atlantic Refining Co., C.A.3d, 1956, 235 F.2d 570.

The 1971 Pocket Part to Volume 3, for use during 1972, states under §1308 at page 279:

> The First Circuit has held that resort should be made to the procedure of Rule 59(e), rather than Rule 60(b), if the time for moving under the former rule has not expired. Thus where a motion to vacate a judgment is made within 10 days of entry of judgment, and does not specify the rule under which it is made, it will be construed as a Rule 59(e) motion and will suspend the finality of the judgment for purposes of appeal.

The First Circuit case was Foman v. Davis, C.A.1st, 1961, 292 F.2d 85, reversed on other grounds, 1962, 83 S. Ct. 227, 371 U.S. 178, 9 L.ed 2d 222.

At page 280 of the Pocket Part, note 84.1 includes:

> Appellants' timely motion to vacate judgment of dismissal was equivalent of a motion to alter or amend judgment and terminated running of time for filing notice of appeal from date of judgment of dismissal to date of denial of motion to vacate; . . .Theodoropoulos v. Thompson-Starrett Co., C.A. 2d 1969, 418 F.2d 350, certiorari denied 90 S. Ct. 1697, 398 U.S. 905, 26 L.ed 2d 65.

Subsequent to the filing of F. M. Cocke's opening brief, Francis J. Donofrio, adhering to the trial court judge's separation of F. M. Cocke's counterclaims against Transamerica from those against the Buyers, entered an order dismissing the appeal in its entirety as to the Buyers. The only ground stated was [19] that the notice of appeal was untimely. F. M. Cocke's motion for findings of the particular grounds upon which the stated untimeliness was based was denied by order entered by Francis J. Donofrio. Later, he entered the order dismissing the appeal as to Transamerica, on its motion, on the stated ground that the appeal was frivolous, so once again avoiding the issues of whether the agreement had been repudiated or cancelled, and ignoring the documentary evidence.

In Preston v. Denkins (1963) 94 Ariz. 214, 382 P.2d 686, the Arizona Supreme Court, sitting en banc, in a unanimous decision held that a judgment void for lack of jurisdiction may be set aside by means of a motion to vacate, and that an order setting aside an entire judgment as void does not leave the judgment valid as against defendants

not properly before the court on the motion to vacate.

3. THE CORPORATE OFFICER OF THE COURT

Title Insurance Company of Minnesota, a Minnesota corporation, did willingly accept its appointment as an officer of the court under the trial court judge's Order and Writ of Assistance, etc., of October 31, 1973, on Buyers' Application in C-222472. Minnesota Title agreed to close the escrow in accordance with the escrow instructions as altered by the previous judgments and orders, as further altered by such Order and Writ, and as to be still further altered by the trial court judge in accordance with such Order and Writ. Minnesota Title has willingly accepted delivery to it by Transamerica of the escrow file, including the deeds, in the following circumstances: The Order of October 31, 1973, took judicial notice of, and so established, the fact that Transamerica was unwilling as escrow agent to comply with the escrow instructions and also unwilling to issue any title policy, so requiring under paragraph 24 the return of Sellers' deeds to the party who executed same. It was established [20] on November 27, 1972, and again in early January, 1973, since the Buyers did not even attempt to comply until the latter date, that the escrow agent was unable or unwilling to comply with the escrow instructions on March 10, 1969, when it formally notified Sellers that Buyers had complied, as pointed out beginning at page 14, line 3, above. In the face of the established failure of the Buyers to comply, the established inability or unwillingness of the escrow agent to comply, and the established unwillingness of Transamerica to issue its title policy, the trial court judge, the Buyers, Transamerica, and Minnesota Title, instead of

returning the deeds to the parties who executed them, joined in the delivery of such deeds to Minnesota Title, in furtherance of the concerted attempt to extort from F. M. Cocke his consent to the unlawful alterations to the agreement and escrow instructions.

Copies of Buyers' Application For Writ Of Assistance, etc., of the trial court judge's Order of October 31, 1973, granting the Writ, and of the Writ itself, are attached as Exhibit G.

V.

ADDITIONAL ALTERATIONS
SOUGHT BY THE OTHER THREE PARTIES

Subsequent to the deposit of his deeds into escrow by the broker on or about December 31, 1968, F. M. Cocke advised Mr. Tanner, who signed the agreement for James Stewart Company, that he was in need of funds, and could wait no longer for the Buyers to complete their metes and bounds descriptions of the 5-acre mortgage release parcels. Mr. Tanner suggested, and F. M. Cocke agreed, that $20,000 would be advanced to F. M. Cocke from escrow funds upon his furnishing a note and mortgage on Parcel 2 for $40,000, as double security therefor, and allowing more time for Buyers to complete their release descriptions. On or about January 10, 1969, F. M. Cocke executed and deposited [21] on the escrow officer's desk the $40,000 note and mortgage, and received in exchange the escrow agent's check for $20,000 drawn on escrow funds. However, Mr. Tanner picked up the note and mortgage from the desk and carried them from the escrow office, over F. M. Cocke's objections but with the tacit approval of the escrow officer, in violation of fine print

paragraphs 11 and 12 of the escrow agreement. By his objections F. M. Cocke made it clear that it was his intention to deliver the note and mortgage into escrow. As defined in ARS §44-2208(14) delivery means voluntary transfer of possession. Even if Transamerica could establish, as claimed by it, that by James Stewart Company's removal of the note and mortgage it merely took back its $20,000 earnest money payment delivered to Sellers by the escrow agent, it is clear that the escrow could not close until either the note with mortgage, or the extra $20,000 represented by same, was delivered into escrow.

2. On January 21, 1969, F. M. Cocke signed and delivered into escrow the Instructions And Agreement On Distribution Of Funds prepared by the broker, a professor of accounting, in accordance with the trustee Bank's instructions specifying joint control of the trust land proceeds by F. M. Cocke and Joan H. Cocke. By letter of February 26, 1969, to the escrow agent, prepared by her attorney, Joan H. Cocke repudiated the trustee Bank's adoption of the cancellation provisions and its instructions as to the joint control, and demanded payment of such proceeds direct to her. Buyers by their documents and new demands delivered into escrow my mail on March 7, 1969, the escrow agent by its March 10, 1969, letter notifying Sellers that by such documents and demands Buyers had complied, and the trial court judge in the judgment entered September 27, 1972, in favor of Buyers, joined in such repudiation.

3. March 19, 1969, was the last day for Buyers to [22] comply under the mandatory cancellation notice received from the escrow agent, following F. M. Cocke's March 5, 1969, notice of intent to cancel.

4. As discussed above at page 11, line 2, to page 12, line 20, on March 20, 1969, the escrow agent announced Transamerica's unwillingness to issue its title policy on F. M. Cocke's Parcel 2. Under paragraph 24 such unwillingness put an end to the agreement, if not already cancelled by the escrow agent's March 10, 1969, notice that Buyers had complied or by the failure of Buyers to comply by March 19, 1969.

5. As mentioned above at page 14, line 26, on March 26, 1969, in a second letter to the escrow agent, Buyers affirmed their position that the documents and demands delivered into escrow on March 7 met all requirements on the part of the Buyers. Buyers' continued insistence that their new demands be met as a condition to close of escrow constituted, without more, repudiation of the agreement. In Equitable Trust Co. of New York v. Denver and R. G. Railroad Co. v. Western Pac. Railroad Co. (1917) 244 F. 485, affirmed CCA, 2d (1918) 250 F. 327, cert. den. (1918) 246 U.S. 672, 62 L.ed 932, 38 S. Ct. 423, Learned Hand, District Judge, said at 244 F. 501:

> To say that you will not pay as bound, unless the promisee make some concession in his rights, is to say that you will not pay as you have promised at all. That is repudiation without even pretense of justification. When the default followed, it took its character from this preceding declaration, and gave the obligee the right to treat the contract at an end and to sue.

VI.

THE ENLISTMENT OF STATE POWER

1. On April 22, 1969, Buyers filed their Complaint For Specific Performance of the agreement and escrow instructions, and for damages for delay, against only Sellers. A copy of the agreement and instructions was attached to the complaint. The [23] case was assigned to trial court judge Irvin Cantor as Case No. C-222472. Although Buyers demanded as part of the relief sought that the title insurance policies be issued, that the escrow be ordered closed, and that Transamerica be ordered to release the mortgages on the 25 release parcels as provided in the agreement, Buyers have never joined Transamerica, as mentioned above at page 12, line 1. The suit was prosecuted against only F. M. Cocke.

2. On June 23, 1969, F. M. Cocke filed his answer and compulsory counterclaim and cross-claim jointly and severally against Buyers, Transamerica, and Joan H. Cocke, as indispensable parties to the adjudication of the mutual rights and obligations arising from the single contract. F. M. Cocke's counterclaim sought return of Sellers deeds, and damages for delay, based on his claims:

(1) that the rights and obligations of Sellers and Buyers were subjected to the rights and obligations delegated by them to Transamerica as esscrow agent and title insurer, particularly by fine print Cancellation paragraph 24;

(2) that without more the agreement had been repudiated, and so terminated or cancelled, by Buyers' new demands received by the escrow agent March 7, 1969,

so requiring return of the deeds;

(3) that the agreement had been cancelled as specified by paragraph 24 by the escrow agent's formal written notice of March 10, 1969, to Sellers that by the documents and new demands received from Buyers they had done everything required of them to close the escrow, so establishing the escrow agent's inability or unwillingness to comply with the instructions earlier agreed to, and requiring the return of the deeds;

(4) that the agreement had become cancelled as specified by paragraph 18 by Buyers' failure to comply within the [24] 13-day period following the filing on March 5, 1969, of F. M. Cocke's notice of intention to cancel, as provided for by paragraphs 16 and 17, so requiring return of the deeds; and

(5) that the agreement had been cancelled as specified by paragraph 24 by Transamerica's unwillingness to issue its title policy on Parcel 2, as announced on March 20, 1969, by the escrow officer, so requiring return of the deeds.

3. By minute entry of September 2, 1969, the trial court judge ordered that F. M. Cocke's counterclaim and cross-claim be amended so as to separate the joint claims into three separate claims, one against each of the three defendants as discussed above at page 15, line 19, with separate and independent judgments. F. M. Cocke did not amend his cross-claim against Joan H. Cocke, for the reasons stated above at page 15, line 30.

4. On October 3, 1969, Transamerica counterclaimed against F. M. Cocke, seeking

attorney fees by the enforcement of fine print paragraphs 8, 9 and 10 without regard to the issues raised by F. M. Cocke as to whether the agreement had been repudiated or cancelled before the attorney fees were incurred.

5. On November 10, 1970, the trial court judge entered separate summary judgment in favor of Transamerica and against F. M. Cocke on their opposing counterclaims, and awarded costs and attorney fees to Transamerica in the amount of $5,192.24. Neither in nor in connection with the judgment where there any findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims, contrary to Rule 56(d).

6. On November 19, 1970, the trial court judge entered judgment in favor of Joan H. Cocke on F. M. Cocke's cross-claim against her, without regard to the cancellation provisions, which were adopted by the trustee Bank. The deposit of the trustee Bank's deed into escrow in the written terms which accompanied [25] such deposit, and the acceptance thereof by the escrow agent, constituted a contract in and of itself between the trustee Bank and the escrow agent. Such contract could not be altered by a court without the consent of both, and the terms of deposit required under paragraphs 18 and 24 the return of such deed upon the established failure of the escrow agent and of Buyers to comply in March, 1969.

7. By minute order of December 8, 1970, the trial court judge granted Buyers' motion for summary judgment against only F. M. Cocke, on their opposing claims. Trial on the issue of the dollar amount of the

damages for delay claimed by Buyers to have been caused by F. M. Cocke was subsequently set.

8. Prior to the trial without a jury F. M. Cocke under Rule 52(a) requested findings of fact and conclusions of law as to when and by what act or failure to act he had failed to comply with the agreement and instructions so as to cause the claimed delay. He also requested findings and conclusions as to when and by what act Buyers had complied so that the escrow could have been properly closed instead of cancelled. These requests were completely ignored. The beginning of the period of claimed delay was thus never established.

9. On September 27, 1972, following the trial, the trial court judge entered judgment in favor of Buyers, granting them specific performance by F. M. Cocke, alone, of the agreement and instructions as altered by the judgment, and awarding them damages against him for claimed delay in the amount of $47,004.86. As with the judgment in favor of Transamerica, there were no findings upon the issues raised by F. M. Cocke or upon the undisputed documentary evidence presented in support of his claims.

10. Following the piecemeal dismissal of F. M. Cocke's appeal from the judgments and from denial of his motion to vacate same, as set forth above beginning at page 18, line 28, the Court [26] of Appeals by order dated October 30, 1973 directed the return of the record to Superior Court.

11. As mentioned above at page 19, line 17, on Buyers' Application in C-222472 the trial court judge on October 31, 1973, issued the Order and Writ of Assistance to carry the unlawful alterations into effect

by ordering that the escrow be closed in accordance therewith. Among other things, the Order, prepared by Buyers' attorney, authorized Minnesota Title to execute all documents, including warranty deeds, in the name of Francis M. Cocke. This would include the No. 2 spurious deed and the second set of mortgage releases, mentioned above at page 12, line 7. Among other things the Writ, also prepared by Buyers' attorney, directed the Sheriff of Maricopa County to remove F. M. Cocke from possession of the land upon compliance by Buyer with the terms as altered by the Order and Writ and as to be further altered by further court order.

VII.

WANT OF JURISDICTION OVER THE SUBJECT MATTER

Each of the separate judgments in C-222472 in favor of the three other parties to the agreement, Joan H. Cocke, Transamerica, and the Buyers, was and is void on its face for lack of jurisdiction over the subject matter, as was and is also each of the orders of the appellate courts which directly or indirectly upheld such judgments.

In Hamilton v. Nakai (9th Cir., 1972) 453 F.2d 152, cert. den. (1972) 406 U.S. 945, 32 L.Ed.2d 332, the court said at 156:

> The Supreme Court long ago established the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter:
>
> Jurisdiction is defined to be the power to hear and determine the

subject-matter in controversy in the suit before the court, and the rule is universal, that if the power is conferred to render the judgment or enter the decree, it also includes the power to enforce such judgment or decree. (Citations omitted.) [27]

Process subsequent to judgment is as essential to jurisdiction as process antecedent to judgment, else the judicial power would be incomplete and entirely inadequate to the purpose for which it was conferred by the Constitution. (Emphasis added.) Riggs v. Johnson County, 1867, 73 (6 Wall.) U.S. 166, 187, 18 L.Ed 768.

In the words of Rule 12(b), if a court is without the power or jurisdiction to grant the relief sought, it is without jurisdiction over the subject matter. Rule 12(b) 6 & 1, as amended, Federal Rules of Civil Procedure, and 16 ARS Rules of Civil Procedure.

1. ALTERATION OF CONTRACTS

As briefly stated in Goodman v. Newzona Investment Co. (1967) 101 Ariz. 470, 421 P.2d 318, another universal rule is:

> It is not within the province or power of the court to alter, revise, modify, extend, rewrite or remake an agreement. Its duty is confined to the construction or interpretation of the one which the parties have made for themselves. Where the intent of the parties is expressed

> in clear and unambiguous language, there is no need or room for construction or interpretation and a court may not resort thereto.
>
> (Citations omitted)

It follows that where the relief sought is the alteration of a valid provision of a valid contract, the court is without jurisdiction over the subject matter.

2. INDISPENSABLE PARTIES

In Provident Tradesmen's Bank & Trust Co. v. Patterson (Jan., 1968) 390 U.S. 102, 19 L.Ed 2d 936, 88 S. Ct. 733, in reviewing Rule 19 as amended and the cases relied on by the Court of Appeals in dismissing a complaint in the absence of an indispensable party, the court at page 951 of 19 L.ed 2d quoted and approved Mallow v. Hinde, 12 Wheat. 193, 6 L.ed 599. In Mallow v. Hinde, the court upheld dismissal of the complaint, even though the absent party could not be joined because not within the territorial jurisdiction of the lower court. The court in that early case said: [28]

> In this case, the complainants have no rights separable from, and independent of, the rights of persons not made parties. The rights of those not before the Court lie at the very foundation of the claim of right by the plaintiffs, and a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties. . . .We do not put this case upon the ground of jurisdiction, but upon a much broader ground. . . .We put it on the ground that

> no Court can adjudicate directly upon a person's right, without the party being either actually or constructively before the Court.

Put another way, in order to grant by judgment or decree the relief sought the court must have power or jurisdiction over all persons whose rights are to be affected thereby; otherwise, execution could not issue to carry the judgment or decree into effect. Terrell v. Allison, 21 Wall. 289, 22 L.ed 634, was one of the cases stating the rule pointed to in Hamilton v. Nakai, supra, that the jurisdiction of a court to enforce its decree is coextensive with its jurisdiction to determine the rights of the parties. In Terrell the court also stated and followed the rule that a writ of assistance can only issue against parties whose rights have been determined in the proceedings, and persons entering into possession under them after suit commenced, pendente lite, and are thus bound by the decree.

In the words of Rule 12(b)1, 6 & 7, the court is left without jurisdiction over the subject matter where left without the power or jurisdiction to grant the relief sought because of failure to join a party indispensable under Rule 19.

3. WANT OF FINDINGS

In none of the proceedings, orders, or judgments in the state trial court in C-222472 was there any specification, decision, finding of fact or conclusion of law, under Rule 56(d) on summary judgments or under Rule 52(a) on trials to the court, on the issues of fact and law raised by

F. M. Cocke in his affirmative claims against Joan H. Cocke, Buyers and Transamerica, [29] or on the undisputed documentary evidence presented in support of such claims.

In Rio Grande Irrigation & Colonization Co. v. Gildersleeve, 174 U.S. 603, 19 S. Ct. 761, 43 L.ed 1103, the court said (L.ed, p. 1105):

> As was said in Thompson v. Hatch, 3 Pick. 512: "A duly authorized rule of court has the force of law, and is binding upon the court as well as upon parties to an action, and cannot be dispensed with to suit the circumstances of any particular case. . . .The courts may rescind or repeal their rules, without doubt; or, in establishing them, may reserve the exercise of discretion for particular cases. But the rule once made without any such qualification must be applied to all cases which come within it, until it is repealed by the authority which made it."

In United States v. Aluminum Co. of America, 2 F.R.D. 224 (1941), the District Court S.D. New York said at page 231:

> Rule 52 is incontrovertibly valid. It is also mandatory; it is as binding on this court as would be a statute in the same terms. Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U.S. 603, 608, 609, 19 S. Ct. 761, 43 L.ed 1103; Weil v. Neary, 278 U.S. 160, 165, 169, 170, 49 S. Ct. 144, 73 L.ed 243. See In re G. W. Giannini,

Inc., 2 Cir., 90 F.2d 445, 447, 111 A.L.R. 1492.

So far I have refrained entirely from going into numerous issues made by the pleadings and have not even mentioned the evidence bearing on them.

For the reasons given, therefore, it seems to me (1) that this court is without authority to dispense with either the findings or the conclusions contemplated by Rule 52 and (2) that, in order to obey the rule, as construed by the Supreme Court--regardless of the contents of the oral opinion--findings must be made and conclusions stated on all issues in the present case.

In Baltimore & Ohio Railroad Company v. United States, 298 U.S. 349, 80 L.ed 1209, 56 S. Ct. 797 (1936), supra, the court said at L.ed. 1224:

> The due process clause assures a full hearing before the court or other tribunal empowered to perform the judicial function involved. That includes the right to introduce evidence and have judicial findings based upon it.

It follows that the separate judgments entered in C-222472 in [30] favor of Joan H. Cocke, Transamerica, and the Buyers were wanting in findings and therefore wanting in due process of law, and the court was therefore without authority or jurisdiction to grant the relief sought and purportedly

granted, and thus without jurisdiction over the subject matter.

In Thompson v. Whitman, 85 U.S. 457, 21 L.ed 897, the court said at L.ed 901:

> Thus, in Elliott v. Peirsol, 1 Pet., 328, 340, it was held that the Circuit Court of the United States for the District of Kentucky might question the jurisdiction of a county court of that State to order a certificate of acknowledgment to be corrected; and for want of such jurisdiction to regard the order as void. Justice Trimble, delivering the opinion of this court in that case, said: Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, it it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.

In Arenas v. United States, 95 F. Supp. 962, affirmed (9th Cir. 1952) 197 F.2d 418, the district court said, at page 970 of F. Supp.:

> In brief, the Court, in the prior Arenas case, had no jurisdiction of the subject matter which it assumed to determine, the relationship of Arenas and others not before the Court to Guadaloupe's allotment as her heirs at law. Such lack of jurisdiction appears

on the face of the judgment roll. The judgment to that extent is, therefore, void on its face, . . .

(emphasis added)

In Pacific National Insurance Co. v. Transport Insurance Co. (8th Cir., 1965), 341 F.2d 514, the court said at 516:

> . . .if jurisdiction is lacking the trial court should on its own motion decline to proceed and if the case is tried where jurisdiction is lacking, the jurisdiction of the appellate court on review is limited to correcting the error of the trial court in entertaining the action. These principles are fundamental and were recognized and applied by us in the recent case of Rock Island Millwork Co. v. Hedges-Gough Lumber Co. (8th Cir., 1964), 337 F.2d 24, 26, 27.
>
> (emphasis added) [31]

For related rulings see Riley v. County of Cochise (Div. 2), 10 Ariz. App. 55, 455 P.2d 1005 (1969), and Quiroz v. Alfaro (Div. 2), 18 Ariz. App. 173, 500 P.2d 1161 (1972), Reh. den. Oct., 1972.

VIII.

WANT OF JURISDICTION IN C-222472

1. ALTERATION OF CONTRACTS

Each of the three separate judgments in C-222472 against F. M. Cocke was and is void on the face of the judgment roll for want of power or jurisdiction to grant the

relief sought and purportedly granted, which relief was alteration of the escrow instructions:

(1) by the judgment in favor of Joan H. Cocke, the deletion of the trustee Bank's instructions, which included the cancellation provisions;

(2) by the judgment in favor of Transamerica, the deletion of at least the cancellation provisions, by the enforcement of only paragraphs 8, 9 and 10;

(3) by the judgment in favor of Buyers, the deletion of the conditions specified in the first sentence of fine print paragraph 14 as to compliance by Buyers and as to the willingness of Transamerica to issue its title insurance policy, and the deletion of the cancellation provisions.

2. INDISPENSABLE PARTIES

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because of failure to join a party indispensable under Rule 19:

(1) by the judgment in favor of Joan H. Cocke, by the failure to join the trustee Bank and the escrow agent in the alteration of the terms of deposit of the trustee Bank's deed, agreed to by them. [32]

(2) by the judgment in favor of Transamerica, by the failure to join the Buyers, indispensable in the determination of whether the agreement was ended, so ending the rights thereunder of Transamerica and of Buyers, before the attorney fees were incurred;

(3) by the judgment in favor of Buyers, by the failure to join Transamerica as title insurer and holder of the deeds.

3. WANT OF FINDINGS

Each of such judgments was and is void on the face of the judgment roll for want of power or jurisdiction to grant the relief sought and purportedly granted, because such judgment was wanting in findings upon decisive issues presented and upon undisputed documentary evidence presented which was decisive of such issues, and therefore wanting in due process of law. In none of such judgments, nor in the trial court judge's orders based thereon, was there any finding as to the effect of the following:

(1) the cancellation provisions;

(2) the trustee Bank's written escrow instructions adopting the cancellation provisions;

(3) F. M. Cocke's March 5, 1969, written notice of intent to cancel, and the escrow agent's written notice thereof to Buyers, notifying Buyers that they must comply by March 19, 1969;

(4) Buyers' documents and written demands received by the escrow agent on March 7, 1969;

(5) the escrow agent's letter of March 10, 1969, formally notifying Sellers that by deposit of such documents and demands Buyers had complied;

(6) the written agreement of November 27, 1972, between Transamerica and counsel for Joan H. Cocke and for Buyers, that Buyers had not yet complied; [33]

(7) the further agreement in January, 1973, between Transamerica and the Buyers, evidenced by Buyers' letter of August 29, 1973, attached as Exhibit "K" to Buyers' September 7, 1973, Application to the trial court for the Writ of Assistance, that by January, 1973, Buyers had not yet complied.

IX.

SETTLED PRINCIPLES

It is well settled that expressions by a party to an escrow agreement, particularly where there has been no change in title or possession under its terms, as here, of mere willingness and ability to comply are immaterial to the question of actual compliance. 28 Am Jur 2d, Escrow, §21, 22, 24; 30A CJS, Escrows, §10(a) and 10(b).

As pointed out in Tucson Title Insurance Co. v. D'Ascoli, 94 Ariz. 230, 383 P.2d 119 (1963):

> An escrow agent is held to strict compliance with the terms of the escrow agreement, and is liable for all damages resulting from any deviation.

It has long been settled that where the conditions are fulfilled and the escrow agent fails or refuses to deliver or return the documents or money deposited into escrow, the remedy either in law or equity lies against the escrow agent to obtain the deposit, not against the other party to obtain damages or to compel specific performance of the escrow contract. The other party may be joined in the action against the escrow agent. 28 Am Jur 2d, Escrow, §8, 17, 39; 30A CJS, Escrows, §15.

In Old Wayne Mutual Life Assn. v. McDonough, 204 U.S. 8, 51 L.ed 345, 27 S.Ct. 236, the court said, quoting Scott v. McNeal, 154 U.S. 34, 46, 38 L.ed 896, 901, 14 S. Ct. 1108:

> No judgment of a court is due process of law, if rendered without the jurisdiction in the court, ... [34]

The Arizona case Truax v. Corrigan, 257 U.S. 312, 66 L.ed 254, 42 S. Ct. 124, quoted and followed Barbier v. Connelly, 113 U.S. 27, 28 L.ed 923, 5 S. Ct. 357, in which the court said at L.ed 264:

> The 14th Amendment, in declaring that no State "Shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, . . .that all persons. . . should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; . . .

In Shelly v. Kraemer, 334 U.S. 1, 92 L.ed 1161, 68 S. Ct. 836, the court held that the action of state courts and of judicial officers in their official capacities, even though taken for the enforcement of private agreements, is state action within the meaning of the equal protection clause, and that where the coercive power of state govenment is used by its courts to deny rights subject to the protection of the 14th Amendment, the action of the state courts cannot stand.

In Wells Fargo & Company v. Oscar G. Taylor, 254 U.S. 175, 65 L.ed 205, 41 S. Ct. 93, the court said, in discussing the provision in the Judicial Code that a federal court shall not grant an injunction staying proceedings in a state court, except in bankruptcy cases, at L.ed 211:

> . . .it has come to be settled by repeated decisions and in actual practice that, where the elements of Federal and equity jurisdiction are present, the provision does not prevent the Federal courts. . . . from depriving a party, by means of an injunction, of the benefit of a judgment obtained in a state court in circumstances where its enforcement will be contrary to recognized principles of equity and the standards of good conscience.

In Northern Pacific Ry. Co. v. Kurtzman, County Treasurer, 82 F. 241, the court said:

> I recognize the absolute correctness of the proposition that the Federal courts are forbidden by express provisions in the law enacted by congress [35] to issue injunctions to stay proceedings in any court of a state, but that principle is not applicable where the suit in the Federal court is a direct attack upon a judgment rendered in a state court for the purpose of nullifing such judgment, upon the ground that the same was obtained by fraud, or because the court in which such judgment appears of record had no jurisdiction to render the same. In the exercise of their general equity powers,

> the circuit courts of the United States have always been free to grant relief of this nature in cases coming within their jurisdiction. Galpin v. Page, 18 Wall. 351-375; Pennoyer v. Neff. 95 U.S. 714-748; Arrowsmith v. Gleason, 129 U.S. 86-101, 9 Sup. Ct. 237; Marshall v. Holmes, 141 U.S. 589-601, 12 Sup. Ct. 62. The bill of complaint attacks the judgment of the superior court on the ground that it acted without jurisdiction in rendering the judgments.

In Mitchum v. Foster, 407 U.S. 225, 32 L.Ed.2d 705, 92 S. Ct. 2151 (1972), the court held that:

> Provision of Civil Rights Act authorizing a suit in equity to redress deprivation under color of state law of any rights, privileges, or immunities secured by Constitution is within "expressly authorized" exception of federal anti-injunction statute prohibiting a federal court from enjoining a state court proceeding except as expressly authorized by act of Congress. 28 U.S.C.A. §2283; 42 U.S.C.A. §1983.

At page 2161 of S. Ct. the court said:

> It is clear from the legislative debates surrounding passage of §1983's predecessor that the Act was intended to enforce the provisions of the Fourteenth Amendment "against state action, whether that action be executive, legislative, or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25

> L.Ed 676 (emphasis supplied). Proponents of the legislation noted that state courts were being used to harass and injure individuals, either because the state courts were powerless to stop deprivations or were in league with those who were bent upon abrogation of federally protected rights.

And at page 2162:

> §1983 was thus a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted. The very purpose of §1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights--to protect the people from unconstitutional action under color of state law, "whether that action be executive, legislative or judicial." Ex parte Virginia, 100 U.S. 339, 346, 25 L.ed. 676. In carrying out that [36] purpose, Congress plainly authorized the federal courts to issue injunctions in §1983 actions, by expressly authorizing a "suit in equity" as one of the means of redress.

In Lucarell v. McNair (6th Cir., Jan. 1972), 453 F.2d 836, the court said:

> Turning to the question of McNair's asserted immunity, it is true that as Referee and Administrative Officer of the Juvenile Court of Trumbull County, McNair was

entitled to the full reach of the doctrine of judicial or, in this case, quasi-judicial immunity, and that the doctrine is applicable to actions instituted pursuant to §1983. Nevertheless, the doctrine is not without bounds. Some time ago the Sixth Circuit stated its views as to the limits of the protection thus afforded. In Manning v. Ketcham, 58 F.2d 948 (6th Cir. 1932), we indicated the view that a judge loses all immunity when he acts in absence of all jurisdiction. This rule was discussed at some length in the more recent case of Lynch v. Johnson, 420 F.2d 818 (6th Cir. 1970). See also Bradley v. Fisher, 13 Wall. 335, 80 U.S. 335, 20 L.Ed. 646 (1871).

In Hoffman v. Halden (9th Cir. 1959), 268 F.2d 280, the court said at 296:

> In a Civil Rights conspiracy case, the injury and damage must flow from the overt acts. . . .In the usual case, the order of the court would be the proximate cause and the various preliminary steps would be remote causes of any injury. . . .

and at page 298:

> The law is clear that when two or more persons conspire to violate the civil rights of an individual, acting under color of state law, if one or more of the conspirators is a state officer, then the mere fact that certain of the other conspirators are not state officers

> constitutes no defense to any of them under the Civil Rights statutes.

Hoffman at page 299 in discussing the immunity of judges cites Bradley v. Fisher, and goes on to say:

> A broad holding that all state officials enjoyed immunity would be an improper approach. If courts held that all state officials had immunity from liability under Civil Rights actions for all acts done or committed within the ostensible scope of their authority, this would practically constitute a judicial repeal of the Civil Rights Act. Repeal is the responsibility of Congress, not the courts. [37]

In Bradley v. Fisher, 13 Wall. (U.S.) 335, 20 L.ed 646, the court said, at pages 351, 352 of 13 Wallace:

> A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible.

Cohen v. Norris (9th Cir. 1962) 300 F.2d 24, the court said at page 29:

> In our view Monroe v. Pape announces the rule that an allegation of a purpose to discriminate

or a purpose to deprive one of any federal right, is not essential to the statement of a claim under §1983 predicated on an alleged violation of the due process clause of the Fourteenth Amendment. It is accordingly necessary for us to overrule in this respect the contrary holdings in our earlier decisions in Agnew v. City of Compton and Hoffman v. Halden, and to disapprove the contrary statement made by way of dictum in Walker v. Bank of America.

§44-1211 (14 ARS, 1967) provides:

A person is guilty of a misdemeanor who:

1. Is a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels or any right or interest issuing therefrom, had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

2. Is a party to any bond, action or judgment, or execution, contract or conveyance had, made or contrived with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands.

3. Is a party as provided in paragraph 1 or paragraph 2 of this section, and

(a) At any time wittingly and willingly puts in, uses, avows, maintains, justifies or defends such transaction as true, and had or made in good faith, or

(b) Upon good consideration aliens, assigns or sells any of such lands or goods or other things which have been so conveyed to him. [38]

PRAYER FOR RELIEF

Plaintiff respectfully prays this Court to enter an order:

1. Granting a temporary restraining order or preliminary injunction on application of plaintiff if necessary to preserve the status quo as to title or possession;

2. Setting aside each of the three separate judgments, in favor of Joan H. Cocke, in favor of Transamerica, and in favor of Buyers James Stewart Company and M. Seth Horne and Maurine D. Horne, for want of jurisdiction in the court;

3. Granting plaintiff a declaratory judgment pursuant to the provisions of 28 U.S.C. 2201 declaring his rights and defendants' corresponding duties and liabilities arising under the transaction set forth in the complaint herein;

4. Ordering the return of Sellers' three deeds to the parties who executed same;

5. Ordering the return of the $40,000 note and mortgage to plaintiff on such terms as be deemed just and equitable;

6. By way of quieting title, establishingt plaintiff's estate in Parcel 2 as described in his deed thereto, and the estate of plaintiff and his co-tenant First National Bank of Arizona, as trustee, in their undivided half-interests in Parcel 1, as described in plaintiff's deed to his half-interest in same, and barring and forever estopping defendants James Stewart Company, M. Seth Horne and Maurine D. Horne from having or claiming any right or title to the premises, claimed by them as set forth in this [39] Complaint, adverse to plaintiff or the trustee Bank, all as provided by ARS §12-1101, 12-1102 as amended, 12-1103 as amended, and 12-1104;

7. Granting plaintiff damages severally and jointly from defendants Cantor, Jacobson, Donofrio, Tanner, Kelly, Schneider, Whitney, Gillenwater, Transamerica, Minnesota Title, James Stewart Company and M. Seth Horne and Maurine D. Horne, and Joan H. Cocke, pursuant to 28 U.S.C. §1343, 42 U.S.C. §1981, 1982, 1983, 1985, 1986 and 1988 and calculated as follows:

   a. $50,000 lost by plaintiff by delay in making higher and better use of his land, by reason of defendants' misconduct in C-222472;

   b. $50,000 in damages for infringement of his civil rights by defendants' misconduct in C-222472;

   c. $50,000 in punitive, exemplary damages by reason of defendants' misconduct in C-222472.

   d. Such other and further relief as the Court deems just and equitable.

/s/ FRANCIS M. COCKE
1320 South Priest Road
Tempe, Arizona 85281

STATE OF ARIZONA)
: ss.
County of Maricopa)

F. M. COCKE being first duly sworn, on oath deposes and says:

That as plaintiff he has written the foregoing complaint and knows the contents thereof, and that the matters and things [40] stated therein are true of his own knowledge, except as to those matters therein specifically stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ FRANCIS M. COCKE

[41] FRANCIS M. COCKE, Plaintiff
1320 South Priest Road
Tempe, Arizona 85281
(602) 967-0734

In propria persona

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

FRANCIS M. COCKE, Plaintiff,	)
vs.	)
IRWIN S. CANTOR, et al., Defendants.	)

COMPLAINT FOR RELIEF FROM STATE COURT JUDGMENTS AND ORDERS ENTERED WITHOUT JURISDICTION, AND FOR INJUNCTION AND DAMAGES

EXHIBITS

[42] EXHIBITS

		Page
A	Agreement and trustee Bank's instructions	2
B	F. M. Cocke's deeds to Parcel 2 and his half-interest in Parcel 1	2
C	F. M. Cocke's notice of intent to cancel, and the escrow agent's notice thereof to Buyers	9
D	Buyers' letter of new instructions and demands, and the escrow agent's notice that Buyers had done everything required to close the escrow	9
E	The November 27, 1972, agreement between Hubert Kelly for Buyers, Loretta Whitney for Joan H. Cocke, and Transamerica, and Buyers' letter of August 29, 1973, to Transamerica	14
F	The three separate judgments, of November 10, 1970, in favor of Transamerica, of November 19, 1970, in favor of Joan H. Cocke, and of September 27, 1972, in favor of Buyers	15
G	Buyers' Application For Writ Of Assistance, etc., the trial court judge's Order of October 31, 1973, granting the Writ, and the Writ itself	20

[43] AGREEMENT

THIS AGREEMENT made and entered into this 9th day of October, 1968, between JAMES STEWART COMPANY, Buyer, and JOAN H. COCKE and FRANCIS M. COCKE, Sellers, and together with that certain Escrow Agreement No. 02013111-7 entered into with Transamerica Title Insurance Company, signed by the same parties, a copy of which is attached hereto and by reference made a part hereof, constitutes the full agreement between the parties for the purchase and sale of approximately 124 acres of land, being that part of the SE 1/4 of Section 20, Township 1 North, Range 4 East, G&SRB&M, lying north of the right-of-way of the Jenkins Ditch, EXCEPT a parcel of 3-5 acres containing certain improvements of the Seller Francis M. Cocke situated at the northeast corner of the property, north of the George Ditch.

1. Sellers agree to cooperate with Buyer in altering the boundaries of any of the various 5-acre releases to fit the needs of the Buyer, and Buyer agrees that releases shall not impair access to unreleased portions of the land.

2. Seller agrees within two years to remove the farm sheds, barns, and unhoused farm implements, except for stables for three horses, from the 3-5 acres of land reserved from the sale.

3. On the parcel reserved from the sale, Seller agrees to grant easements before close of escrow for street and utility purposes, and to improve said easement by construction and paving at his cost, when streets are constructed and paved on the northeastern portion of the property for a half street on 13th Street

and a half street along the north side of the George Ditch.

4. In the event of any sale outside of Sellers' family, Sellers agree that Buyer shall have the right of first refusal (unless taken by the State of Arizona) to purchase the 11.2 acre triangle and the 12.9 acre "frog" in the south 100 acres of the SW 1/4 of Section 20, Township 1 North, Range 4 East, being Sellers' lands remaining after a portion of said 100 acres was taken by said State, and also to purchase the 3-5 acre parcel at the Northeast corner of property, reserved to Seller.

5. Buyer shall have the right to grant easements for road and utility purposes on the unreleased land. Easements for such streets [44] shall not however reduce the area of land on which release prices are computed.

6. This Agreement shall enure to the benefit of the parties hereto, their heirs, administrators, executors, successors and assigns.

IN WITNESS WHEREOF, the parties have executed this Agreement the date and day first above written.

JAMES STEWART COMPANY
By
/s/ Wallace O. Tanner
BUYER Vice Pres.

s/Francis M. Cocke
FRANCIS M. COCKE

s/Joan H. Cocke
JOAN H. COCKE
SELLERS

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared FRANCIS M. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs. Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

STATE OF ARIZONA)
) ss.
County of Maricopa)

On this the 9th day of October, 1968, before me, the undersigned officer, personally appeared JOAN H. COCKE, known to me to be the person whose name is subscribed to the within instrument and acknowledged that she executed the same for the purpose therein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

s/ Mrs Cecelia J. Burton
Notary Public

My commission expires:
Dec. 1, 1969

Transamerica Title Insurance Co — A Service of Transamerica Corporation

ESCROW INSTRUCTIONS

Escrow No. 02013111-7

Phoenix, ARIZONA, October 9, 19 68 ESCROW OFFICER H. KAVANAUGH/I

FRANCIS COCKE, a divorced man, and JOAN H. COCKE, a divorced woman HEREIN CALLED SELLER
whose address is (Mr. Cocke) 1320 South Priest Rd., Tempe, Arizona 967-0734 and (Mrs. Cocke) Country Club Apts. #41, North 7th St. Phoenix Phone 266-2870

JAMES STEWART COMPANY, an Arizona corporation, and/or its nominee HEREIN CALLED BUYER
whose address is 90 T Mayo Central Bldg — 5033 N. Central Phone
~~144 East Country Club Dr., Phoenix, Arizona~~ ZIP CODE

hereby employ Transamerica Title Insurance Company to act as Escrow Agent in connection with a sale by Seller to Buyer upon the following terms and conditions which shall be complied with by said parties on or before December 15th, 19 68, except as otherwise specified herein. The property herein referred to is situated in Maricopa County, Arizona, and is described as follows, to-wit:

SEE ATTACHED: EXCEPT that 3-1/2 acres (approximately) in the NE corner of Parcel No. 2, will be retained by Francis Cocke.

*** See below for additional instructions.

		ALL ITEMS CHECKED THUS (X) OR (✓) ARE THE OBLIGATIONS WHICH EACH PARTY WILL PAY	SELLER	BUYER
SALES PRICE TO BE PAID BY BUYER	~~$ 558,000.00~~ 548,238.15	TAXES 1968 & prior	X	
Which is represented by:		1969 and future		X
EARNEST MONEY TO BE DEPOSITED IN ESCROW To be pd. direct to Seller upon signing these inst.	$ (Heretofore paid) 20,000.00 none	Prorate to close of escrow on basis of land figure		X
CASH PAYMENT TO BE DEPOSITED IN ESCROW On or before Dec. 1, 1968.	$ 44,000.00	IMPROVEMENT LIEN ASSESSMENTS existing liens, if any	X	
MORTGAGE OF RECORD beginning with payment due ____ with approximate unpaid balance of	$ none	proposed liens, if any		X
Existing to remain obligation of Seller - See Schedule "A".		Prorate to None		
AGREEMENT FOR SALE under Escrow No. ____ beginning with payment due ____ with approximate unpaid balance of	$	IRRIGATION PROJECT ASSESSMENTS Transfer, 1968 & prior	X	
		1969 & future		X
(Any variation in amount of Mortgage or Agreement For Sale shall be reflected in		Prorate to if any, close of esc.		X
(Any reserve funds held under said mortgage or agreement shall be	504,238.15 ~~548,238.15~~	FIRE INSURANCE POLICY in the sum of $ none		
BALANCE OF	$ 496,000.00	Prorate to none		
Evidenced By Note and purchase money mortgage.		Prorate FHA INSURANCE to none		
Payable as follows:		Prorate Interest to none		
SEE SCHEDULE "A"		Prorate Rents to none		
Mtg. Parcel 1 77308.39		RECORDING FEES:		
" " " 77308.39		Deed		X
Mtg Parcel 2 265587.21	420,203.99	Mortgage		X
approx. deficiency	84,000.00	Agreement		
		Release of Mtge.		
		REAL ESTATE TRANSFER TAX	X	
		MORTGAGE ASSUMPTION FEE		
		AGENT'S COMMISSION $ See schedule "A"		
		TO: ARLEIGH R. BURTON, 130 East 14th Street, Tempe, Arizona		
		ESCROW CHARGES 1/2 and 1/2	X	X
		TITLE INSURANCE CHARGES:		
		Owners Policy	X	
		Mortgagee Policy		
		ACCOUNTING SERVICES	1/2	1/2

Proceeds of cash payments and future payments under Agreement For Sale or Note and Mortgage, if any, to be paid to Escrow Agent for the benefit of Seller. The title to all future payments under applicable instruments, if any, shall be held by the payees indicated herein as follows: ____

PERSONAL PROPERTY is to be transferred as part of this transaction, and a Bill of Sale will be handed to Escrow Agent for Delivery to Buyer.

None

Upon recordation of instruments, a title insurance policy shall insure title of Buyer.

Escrow Agent is to assume no liability as to the sufficiency of said Bill of Sale or as to the title of said personalty.

ADDITIONAL INSTRUCTIONS:

***The property concerned in this escrow contains approximately 124 acres, the exact description and acreage will be furnished by a registered engineer, and the sales price and mortgage amount will be adjusted on the basis of $4,500.00 per gross acre.

72.3284 — 49.5023 = 121.830 ± acres

REV. 8'68

BEST COPY AVAILABLE

[illegible] Escrow Agent and the terms [illegible]

[illegible] to Escrow Agent all sums and do or cause to be done all other things [illegible] to enable it to comply herewith and to enable Transamerica Title Insurance [illegible]

[illegible] consummate a transfer of an interest in an existing loan sale, Seller and Buyer shall deliver [illegible] Escrow Agent may, at its sole judgment, require for the benefit of any party to said [illegible]

[illegible] Escrow Agent be put, from time to time by it or for them respective credit hereunder, all amounts necessary [illegible] such documents and to pay, on their behalf, all charges and obligations payable by them respectively [illegible]

[illegible] upon demand, all charges payable by them respectively, as provided herein.

[illegible] Escrow Agent may, on their behalf, incur encumbrances, or otherwise make changes in any insurance [illegible] with the consummation of any transaction, [illegible] Escrow Agent is herein provided.

[illegible] Escrow, in the event any demand is made upon it concerning these instructions or the escrow, or in the event any [illegible] are deposited hereunder which in its sole judgment may be subject to dispute, Escrow Agent shall have the right, [illegible] to withhold and refuse to act on any such demand until all such disputes have been settled by mutual written agreement of the parties concerned or by a final order, decree or judgment of a court of competent jurisdiction after the time for appeal therefrom has expired, and Escrow Agent may, in addition to the foregoing, file suit in interpleader for the purpose of having the respective rights of adverse claimants determined and settled by the court. Escrow Agent shall be entitled to employ such legal counsel as it may deem necessary in connection therewith and may charge its reasonable fees therefor against the funds which are the subject matter of the interpleader proceeding, and the parties hereto jointly and severally agree to pay such fees upon demand.

[illegible] Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities [illegible] in connection with these instructions or the escrow or any act occurs among themselves and [illegible]

[illegible] Escrow Agent a first lien and [illegible] to foreclosure until: (1) for all charges and for any damages or expenses [illegible] in connection therewith from all of the rights, title and interest of either the Seller or the Buyer [illegible] Escrow Agent shall be under no obligation to disburse any funds deposited by check or draft, and no [illegible] shall be payable or Escrow Agent in compliance with any of the requirements hereof, until it is advised by [illegible] that all checks or drafts have been honored, unless Escrow Agent specifically agrees in writing [illegible] to the satisfactory thereof. Income, if any, earned by money deposited herein shall be returned by Escrow [illegible] as aforesaid compensation.

[illegible] Escrow Agent is set upon any document furnished by the holder or payee, or a collection agent for the holder [illegible], or any lien or charge or assessment in connection with the property, comprising the amount of such charge [illegible] as the amount secured by such lien unless holding or responsibility for the accuracy of such amounts. [illegible] lien, insurance lien, or service fee charged by any collection agent, holder or payee shall be paid by the Seller [illegible] unless otherwise specified.

[illegible] that when these instructions have been complied with and Transamerica Title Insurance Company is willing to [illegible] its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver, [illegible] as the appropriate party entitled, all necessary documents required to be filed or recorded, instructing the [illegible] to make any documents recorded thereon to the person entitled thereto at the addresses given herein, [illegible] Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. Any other papers or documents [illegible] Escrow Agent, be delivered to the party entitled thereto by mailing to the names herein provided for [illegible] "Buyer, Purchaser or Borrower". Escrow Agent may destroy its file and contents thereof three years [illegible] of escrow or termination of collections, as appropriate. No action against Escrow Agent arising under these [illegible] shall be commenced more than three years from the date the cause of action accrues.

[illegible] that the employment of Transamerica Title Insurance Company, as Escrow Agent, shall not affect any rights to [illegible] it may be entitled under the terms of any title insurance policy issued pursuant to the provisions thereof.

[illegible] CANCELLATION:

In case any party elects to cancel these instructions because of the failure of the other party to comply with any of the [illegible] within the time herein provided herein, said party so electing to cancel shall deliver to Escrow Agent a written [illegible] to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen [illegible] from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

[illegible] such notice cannot be delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within [illegible] days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, [illegible] as Declarations.

[illegible] said other party shall fail within said thirteenday period to comply with all of the terms hereof, [illegible] shall become cancelled and Escrow Agent is thereupon authorized:

First: To pay to the party electing to cancel, any [illegible] money deposited hereunder by said other party, after deducting any charges [illegible]

Second: To pay to said other party, any other [illegible] deposited hereunder by said other party, after deducting any charges remaining unpaid.

Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid.

Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and returned to the files of Escrow Agent.

If, under these instructions, a commission is to be paid to a real estate agent, then, notwithstanding any conflicting [illegible] herein contained:

a) The party obligated to pay the commission shall not participate in any mutual cancellation of these instructions without having first delivered said real estate agent written consent to Escrow Agent. .

b) Upon cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, [illegible] permit to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate agent therein, a sum equal to one-half of the earnest money deposited by any other party and payable to the party so obligated, but not more than the full amount of such commission.

c) If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as [illegible] provided, or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided [illegible] Escrow Agent is directed to pay the charges payable by Buyer from any money deposited [illegible] by Buyer, [illegible] the balance then remaining to Seller, and all documents executed by one party only to persons with Escrow [illegible] are returned to the parties who executed said documents. Mutually executed instruments shall be returned by [illegible]

[illegible] of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under [illegible] shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money [illegible] checks are not to be accepted as payment in these circumstances unless approved by the party tendering [illegible]

[illegible] ITEMS TO BE PAID BY BUYER:

[illegible] are [illegible] of the amount provided to be paid by Buyer as evidenced by an agreement for sale, an executed copy [illegible] shall be delivered by Seller and Buyer to Escrow Agent which shall amend said agreement and hold said [illegible] same as the same are for the account of Seller under said agreement for sale have been paid and the [illegible] Escrow Agent shall deliver said deed to Buyer. In the event of a default [illegible] by Seller, my Buyer, Escrow Agent is hereby instructed, upon demand, and without further [illegible] to deliver to Buyer, or Buyer's nominee, all of the right, title and interest in and to said agreement and real property by recordation of Affidavit of [illegible] or by delivery of an assignment executed by the parties to Escrow Instructions.

[illegible] Seller may either elect to bring an action against Buyer for specific performance [illegible] or maintain a separate interest in any lawful manner, including, but not limited to, foreclosure by notice of [illegible] Buyer's default may be cured after the expiration of the following periods after such default: where [illegible] is the purchase price: Less than 10% - 30 days; 10% or more, but less than 30% - 60 days; 30% or more, but [illegible] 50% - 120 days. 50% or more - 3 months. In computing said percentages, the amount of any agreement for sale or [illegible] to be paid by Buyer shall be treated as payment only to the extent of principal actually paid thereon by [illegible]

[illegible] Seller elects to declare such agreement in default, Seller shall be entitled to [illegible] Escrow Agent a written declaration of forfeiture thereof in which event the two Parties hereto agree [illegible] conclusive as between each themselves, and Escrow Agent shall be fully protected in [illegible] Escrow Agent shall not be required to determine the [illegible] Buyer to make the payments [illegible] Escrow Agent shall be entitled to rely upon any [illegible] declaration to Buyer as the manner provided herein for the mailing of Notices, [illegible] copy [illegible] Escrow Agent as provided herein, Escrow Agent is authorized to [illegible] comply with the terms of such agreement on the date of such declaration unless the cancellation of [illegible] Escrow Agent within [illegible] days after the date of mailing of a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, [illegible] Escrow Agent is authorized to comply with the demands specified in the declaration and [illegible] Escrow Agent shall not be required to take any further action whatsoever. Any modification of [illegible] agreement between Seller and Buyer, shall be delivered to Escrow Agent before it shall be obligated by [illegible] Escrow Agent. Escrow Agent shall not be obligated in any manner to determine or be responsible for [illegible] expressed by Escrow Agent, which reference shall be limited to matters contained in the printed portion of [illegible] Escrow Agent shall not be liable for any mistake of fact or error of judgment or for any acts or omissions of any kind unless caused by its willful misconduct or gross negligence. Escrow Agent may rely upon any paper, order, notice, list, letter or other document or upon any written or telephonic instructions which it believes to be genuine and [illegible] by the proper party or parties. Escrow Agent shall not be liable for any error of judgment or for any act done or step taken or omitted by it in good faith, or for any mistake of fact or law, or for anything which it may do or refrain from doing in connection herewith, except for its own willful misconduct or gross negligence. Escrow Agent shall not be responsible for the sufficiency or accuracy of the form, execution, validity or genuineness of documents or of any deed, note, contract, bill of sale, notice or any other paper or document deposited with Escrow Agent or for the identity of any person executing such instruments or documents or for the authority of any person acting or purporting to act on behalf of any person executing or delivering any such instruments or documents. Escrow Agent shall not be liable for the loss of any money or any part thereof while the same is in the custody of Escrow Agent, deposited in any bank or trust company, or for any loss or impairment resulting from the failure, insolvency or suspension of any bank or trust company. Escrow Agent shall not be responsible for any delay in the performance of its duties hereunder caused by circumstances beyond its control, including but not limited to delays or failures in performance by Buyer, Seller or any other person or entity, or acts of God or war. Escrow Agent shall not be obligated to take any legal action or commence any proceeding in connection with these instructions or any account established pursuant to these instructions or to appear in, prosecute or defend any such legal action or proceeding until it has been indemnified to its satisfaction against any and all costs, attorneys' fees, expenses and liabilities which may be incurred by it by reason of taking or continuing any such legal action or proceeding. Escrow Agent shall not be responsible for the application of any funds after they have been disbursed in accordance with these instructions. Escrow Agent shall not be responsible for the failure of any bank or trust company to honor any check upon presentation. Escrow Agent shall not be responsible for the failure of any bank or trust company to honor any check upon presentation. Escrow Agent shall not be responsible for the failure of any bank or trust company to honor any check upon presentation.

[illegible] In addition to the regular escrow charges made by Escrow Agent, Seller and Buyer will pay to Escrow Agent [illegible] necessary or appropriate, including but not limited to, [illegible] Escrow Agent may, at its sole judgment, require for the benefit of any party to said escrow, [illegible] Escrow Agent may, on their behalf, incur encumbrances, or otherwise make changes in any insurance [illegible] with the consummation of any transaction, including but not limited to those required under the terms of the Escrow Agent [illegible] Escrow Agent shall be entitled to employ such legal counsel as it may deem necessary in connection therewith and may charge its reasonable fees therefor against the funds which are the subject matter of the interpleader proceeding, and the parties hereto jointly and severally agree to pay such fees upon demand.

[illegible] Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities [illegible] in connection with these instructions or the escrow or any act occurs among themselves and [illegible]

[illegible] Escrow, in the event any demand is made upon it concerning these instructions or the escrow, or in the event any [illegible] are deposited hereunder which in its sole judgment may be subject to dispute, Escrow Agent shall have the right, [illegible] to withhold and refuse to act on any such demand until all such disputes have been settled by mutual written agreement of the parties concerned or by a final order, decree or judgment of a court of competent jurisdiction after the time for appeal therefrom has expired, and Escrow Agent may, in addition to the foregoing, file suit in interpleader for the purpose of having the respective rights of adverse claimants determined and settled by the court.

(Retyped Fine Print Escrow Instructions)
[46]
SELLER:

1. Will deliver to Escrow Agent a deed of the property from Seller to Buyer to be held by Escrow Agent until the terms hereof have been performed, at which time it shall deliver said deed to Buyer.

SELLER AND BUYER:

2. Will deliver to Escrow Agent all documents, pay to Escrow Agent all sums and do or cause to be done all other things necessary, in the sole judgment of Escrow Agent, to enable it to comply herewith and to enable Transamerica Title Insurance Company to issue any title insurance policy provided for herein.

3. Should these instructions contemplate a transfer of an interest in an agreement for sale, Seller and Buyer will deliver to Escrow Agent such documents as Escrow Agent may, in its sole judgment, require for the benefit of any party to said agreement.

4. Authorize Escrow Agent to pay, from any funds held by it for their respective credit hereunder, all amounts necessary to procure the delivery of such documents and to pay, on their behalf, all charges and obligations payable by them respectively, as specified herein.

5. Will each pay to Escrow Agent, upon demand, all charges payable by them respectively, as provided herein.

6. Authorize Escrow Agent to execute on their behalf, form assignments or other-

wise order changes in any insurance called for herein other than title insurance and forward the policies to insurer's agent with the request that the insurer consent to such transfer, attach loss payable clause or make such other additions or corrections as may be specifically required herein, and that said agent thereafter return such policies to Escrow Agent or to the parties entitled thereto.

7. Direct Escrow Agent to comply herewith within the time limits provided herein for compliance, or as soon thereafter as possible unless a demand for cancellation has been made on Escrow Agent as herein provided.

8. Authorize Escrow Agent, in the event any demand is made upon it concerning these instructions or the escrow, at its election, to hold any money and documents deposited hereunder until an action shall be brought in a court of competent jurisdiction to determine the rights of Seller and Buyer or to interplead said parties by an action brought in any such court. Deposit by Escrow Agent of said documents and funds, after deducting therefrom its charges and its expenses and attorney's fees incurred in connection with any such court action, shall relieve Escrow Agent of all further liability and responsibility.

9. Will indemnify and save harmless Escrow Agent against all costs, damages, attorney's fees, expenses and liabilities, which it may incur or sustain in connection with these instructions or the escrow or any court action arising therefrom and will pay the same upon demand.

[47] 10. Grant to Escrow Agent a lien upon and authority to reimburse itself: (1) for its charges and for any damages or expenses which it may incur or sustain in connection herewith from all of the right, title and interest of either the Seller or the Buyer in all of the documents and money deposited hereunder or otherwise held by Escrow Agent: (2) for any other indebtedness due Escrow Agent from Buyer from all right, title and interest of Buyer or for any other indebtedness due Escrow Agent from Seller from all right, title and interest of Seller in all of the documents and money deposited hereunder.

11. Direct that no notice, demand or change in these instructions shall be of effect unless given in writing and that these instructions, and any subsequent instructions, given mutually by Seller and Buyer to Escrow Agent in connection herewith shall constitute the complete escrow instructions, notwithstanding any agreement which Seller and Buyer may have concerning the property.

12. Direct that all money payable hereunder be paid to Escrow Agent. Disbursement of any funds may be made by check of Escrow Agent. Escrow Agent shall be under no obligation to disburse any funds represented by check or draft, and no check or draft shall be payment to Escrow Agent in compliance with any of the requirements hereof, until it is advised by the bank in which deposited that such check or draft has been honored, unless Escrow Agent specifically agrees in writing to accept liability for the sufficiency thereof. Income, if any, earned by money deposited herein shall be retained by Escrow Agent as additional compensation.

13. Authorize Escrow Agent to act upon any statement furnished by the holder or payee, or a collection agent for the holder or payee, of any lien on or charge or assessment in connection with the property, concerning the amount of such charge or assessment or the amount secured by such lien without liability or responsibility for the accuracy of such statement. Any transfer fee, statement fee, or service fee charged by any collection agent, holder or payee shall be paid by the Seller herein unless otherwise specified.

14. Direct that when these instructions have been complied with and Transamerica Title Insurance Company is willing to issue its title insurance policy, as hereinafter provided, and when Escrow Agent's charges have been paid, it shall deliver, by filing for record in the appropriate public office, all necessary documents required to be filed or recorded, instructing the County Recorder's Office to mail any documents recorded therein to the parties entitled thereto at the addresses given herein, at which time Escrow Agent shall disburse all funds paid to it hereunder, as provided herein. Any other papers or documents may, at the option of Escrow Agent, be delivered to the party entitled thereto by mailing in the manner herein provided for mailing of "Notices, Demands or Declarations". Escrow Agent may destroy its file and contents therein after three years from close of escrow or termination of collection, as appropriate. No action against Escrow Agent arising under these instructions shall be commenced more than three years from the date the cause of action accrues.

[43] 15. Agree that the employment of Transamerica Title Insurance Company, as Escrow Agent, shall not affect any rights to which it may be subrogated under the terms of any title insurance policy issued pursuant to the provision thereof.

CANCELLATION:

16. If either party elects to cancel these instructions because of the failure of the other party to comply with any of the terms hereof within the time limits provided herein, said party so electing to cancel shall deliver to Escrow Agent a written notice to the other party and Escrow Agent demanding that said other party comply with the terms hereof within thirteen days from the receipt of said notice by Escrow Agent or that these instructions shall thereupon become cancelled.

17. When such written notice is delivered to Escrow Agent by the party so electing to cancel, Escrow Agent shall within three days thereafter send a copy of said notice to the other party in the manner provided herein for the mailing of Notices, Demands or Declarations.

18. In the event said other party shall fail within said thirteen-day period to comply with all the terms hereof, these instructions shall become cancelled and Escrow Agent is thereupon authorized:

19. First: To pay to the party electing to cancel, any earnest money deposited hereunder by said other party, after deducting any charges;

20. Second: To pay to said other party, any other money deposited hereunder by said other party, after deducting any charges remaining unpaid;

21. Third: To pay to the party electing to cancel, any money deposited by said party, after deducting any charges remaining unpaid;

22. Fourth: To return all documents deposited hereunder to the party who delivered the same except documents executed by both Seller and Buyer, which shall be marked "cancelled" and retained in the files of Escrow Agent.

23. If, under these instructions, a commission is to be paid to a real estate agent, then, notwithstanding any conflicting provisions herein contained:

(a) The party obligated to pay the commission shall not acquiesce in any mutual cancellation of these instructions without having first delivered said real estate agents written consent to Escrow Agent.

(b) Upon cancellation of these instructions for any reason, should any funds, after deducting Escrow Agent's charges, become payable to a party obligated hereunder to pay said commission, then Escrow Agent shall pay to the real estate agent therefrom, a sum equal to one-half of the earnest money deposited

by any other party and payable to the party so obligated, but not more than the full amount of such commission.

[49] 24. If Escrow Agent is unable or unwilling to comply with these instructions for any reason other than cancellation as hereinbefore provided, or if Transamerica Title Insurance Company is unwilling to issue any title insurance policy provided for herein, Escrow Agent is directed to pay the charges payable by Buyer from any money deposited hereunder by Buyer, paying the balance then remaining to Buyer, and to pay the charges payable by Seller from any money deposited hereunder by Seller, paying the balance then remaining to Seller, and all documents executed by one party only on deposit with Escrow Agent shall be returned to the parties who executed said documents. Mutually executed instruments shall be retained by Escrow Agent.

25. Notwithstanding any of the provisions herein, Escrow Agent is hereby instructed that any payments of money due under a cancellation notice shall not be accepted unless said payment is tendered in cash, certified or cashier's check, or money order. Personal checks are not to be accepted as payment in these circumstances unless approved by the party seeking cancellation.

AGREEMENT FOR SALE OF REAL PROPERTY:

26. Should any part of the amount provided to be paid by Buyer be evidenced by an agreement for sale, an executed copy thereof, the deed herein provided to be furnished by Seller, and such other documents as Escrow Agent may, in its sole

judgment, require will be delivered by Seller and Buyer to Escrow Agent which shall record said agreement and hold said deed until such time as all sums due for the account of Seller under said agreement for sale have been paid and the instructions herein have been met, at which time Escrow Agent shall deliver said deed to Buyer. In the event of a default in the agreement terms, by Buyer, Seller and Buyer hereunder, their heirs, successors, and assigns, agree that Escrow Agent may forfeit all right, title and interest of Buyer in said agreement and real property by recordation of Affidavit of Completion of Forfeiture in accordance with procedures agreed by the parties in Escrow Instructions.

27. If Buyer is in default under such agreement, Seller may either elect to bring an action against Buyer for specific performance of agreement or enforce a forfeiture thereof in any lawful manner, including, but not limited to, forfeiture by notice as hereinafter provided. Forfeiture may be enforced only after the expiration of the following periods after such default; where Buyer has paid on the purchase price: Less than 20% - 30 days; 20% or more, but less than 30% - 60 days; 30% or more, but less than 50% - 120 days; 50% or more - 9 months. In computing said percentages, the amount of any agreement for sale or mortgage agreed to be paid by Buyer shall be treated as payment only to the extent of principal actually paid thereon by Buyer.

28. If Seller elects to forfeit such agreement by notice, Seller shall do so through Escrow Agent by delivering to Escrow Agent a written Declaration of Forfeiture directed to Buyer together with Escrow

Agent's established fee for services rendered in connection with forfeitures. Said fee of Escrow Agent shall be the Buyer's obligation, shall be added to the contract balance owed by Buyer to Seller, shall be a lien upon the subject property and shall be collected by Escrow Agent [50] from Buyer in order for Buyer to avoid the forfeiture. Escrow Agent shall, within three days thereafter, send a copy of said declaration to Buyer in the manner provided herein for the mailing of Notices, Demands or Declarations. If Buyer fails to comply with the terms of such agreement to the date of such compliance before the expiration of ten days from the date said copy was deposited in the United States mail as herein provided, Escrow Agent is authorized to deliver to Seller the documents and money deposited under these instructions or under such agreement and file of record an Affidavit of Completion of Forfeiture executed by Escrow Agent, which affidavit shall be binding on all parties, their heirs, successors and assigns. All funds paid to Escrow Agent in compliance with the demands of any forfeiture notice served in connection with agreements for sale, shall be in the form of cash, cashiers check, or money order only. Personal checks will not be accepted. Said funds shall be paid to the office of Transamerica Title Insurance Company where escrow is being held. In the event any fee which is Buyer's obligation is not paid, said fee, at Escrow Agent's option, shall be deducted from funds due Seller and added to the contract balance owed Seller by Buyer. Seller may declare Buyer in default for nonpayment of said fees when due and enforce a forfeiture of said contract pursuant to the provisions contained herein.

29. In addition to the regular escrow charges made by Escrow Agent, Seller and Buyer will pay to Escrow Agent for its services in receiving, accounting for, remitting funds, terminating the account and in performing services in connection with the transmission of any Notices, Demand or Declaration required to be transmitted under the terms of the Escrow Instructions, or the agreement for sale and implementing the action contemplated or prescribed by any such Notice, Demand or Declaration, such reasonable fees as Escrow Agent has established for the various services to be performed. Said fees shall be paid one-half by Buyer and one-half by Seller unless otherwise specified herein. We reserve the right to make additional charges in unusual circumstances. All fees will be based on the rate in effect as of the date the various services are performed.

ACCOUNTING SERVICES:

30. Seller or Mortgagee as the payee of future installments which may be provided for in these instructions agrees to refund any remittance made by Escrow Agent in reliance on a check which is subsequently dishonored.

31. If a deferred balance is represented by a note secured by mortgage, the Mortgagee agrees to deposit a satisfaction of said mortgage with Escrow Agent for delivery to Mortgagor upon full payment of the note. The Mortgagee further agrees that if upon payment of said note in full you have not for any reason been furnished with a release executed by Mortgagee, you are authorized as Mortgagee's agent to mark the Promissory Note paid in full and cancelled and to execute and record a satisfaction of said mortgage.

32. In the event a note and mortgage is deposited with Escrow Agent for collection hereunder, the Mortgagee shall have the right to withdraw the note and mortgage or any modification thereof at any time without prior notice on payment of fees due Escrow Agent.

[51] 33. Time is of the essence of any agreement to pay or perform hereunder which agreement shall remain unpaid or unperformed as of close of escrow. No payment by Buyer or Mortgagor of such amounts shall be received or receipted for by Escrow Agent unless all amounts due as of the date of compliance are paid unless and until written authority therefor has been delivered to Escrow Agent by the payee of said amount.

34. No transfer or assignment of any rights hereunder shall be made by anyone having an interest herein unless made in such manner and accompanied by such instruments and fees as shall be required by the Escrow Agent.

NOTICES, DEMANDS OR DECLARATIONS:

35. The respective addresses of Seller and Buyer as set forth herein or the last notice of change thereof filed with Escrow Agent by the respective parties, shall be used by Escrow Agent in mailing any Notice, Demand or Declaration to either party.

36. If, for any reason, a Notice, Demand or Declaration of any kind is to be given by either party to the other party, said Notice, Demand or Declaration shall be in writing, signed by the party giving the Notice or making the Demand or Declaration and directed to the other party and shall be filed with Escrow Agent. Escrow

Agent shall within three days after receipt of said Notice, Demand or Declaration, send it to the party to whom it is directed by enclosing a copy of said instrument in an envelope addressed to said party at the last address which said party shall have filed with Escrow Agent, or, if no address has been so filed, to said party, in care of General Delivery, at the City in which the office of Escrow Agent is located as shown on the first page of these instructions, and depositing said envelope with proper postage affixed thereto in the United States mail.

37. The mailing of any such instrument by Escrow Agent in the manner herein provided shall constitute notice of the contents of such instrument to the party to whom the instrument is directed as of the date of such mailing and no further notice thereof shall be required.

DEFINITIONS:

38. The word "charges" as used herein, refers to all charges and advances made and obligations incurred by Escrow Agent in connection herewith, and all charges of Transamerica Title Insurance Company in connection with the issuance of its title insurance policy or the cancellation of any order therefor.

39. The word "property" as used herein, refers to the real property described in and which is the subject of these escrow instructions.

40. The word "party" as used herein, refers to Seller or Buyer as the case may be.

41. The phrase "Seller and Buyer" as used herein, refers to Seller and Buyer both jointly and severally unless otherwise specified.

[52] 42. The day provided herein within which compliance with any requirement must be met shall end at the close of the then regularly established public business hours of Escrow Agent for such day, provided, should Escrow Agent be closed during any of said business hours on said day such requirement may be met on the next succeeding day on which Escrow Agent is open for business throughout said business hours.

43. "Close of Escrow" shall mean the date of the policy of title insurance to be issued herein.

TITLE INSURANCE:

44. The title insurance provided for herein, shall be subject to the conditions of and evidenced by the regular form of Owner's Title insurance policy of Transamerica Title Insurance Company with a limit of liability equal to the total amount to be paid by Buyer. Said policy, upon issuance, shall insure Buyer against loss by reason of defects in the title to the property on the date of filing for record of the documents as provided herein subject to such of the following exceptions as may be applicable in addition to the regular printed exceptions contained in Schedule "B" thereof:

(a) Taxes and assessments payable by Buyer as set forth herein;

(b) Building and other restrictive covenants to which property is subject;

(c) Easements and rights of way for roadways, canals, laterals, ditches and public utilities over and across the property;

(d) Mortgages referred to herein;

(e) Rights of parties under the agreement for sale referred to herein;

(f) Rights of Buyer under the agreement for sale provided for herein;

(g) Any liens or encumbrances affecting said property suffered or incurred through any act or fault of the party insured or anyone deriving an interest in said property by or through the said party insured;

(h) Liabilities and obligations imposed on the land by inclusion in any water or irrigation district;

(i) Reservations and Exceptions in Patents.

45. NOTE: There are some matters which Transamerica Title Insurance Company does not attempt to investigate or determine and for which it assumes no liability. While not a complete list, experience has shown that among these, the following deserve your particular consideration:

(a) Unrecorded mechanic's and material men's liens;

(b) Current personal property taxes;

[53] (c) Utility charges, such as electric, gas, water and sewer.

(d) Charges for irrigation water and power;

(e) Boundary lines, location of improvements and possession;

(f) Compliance with limitations on use of the property, such as zoning and building ordinances and building and other restrictions;

(g) Premiums for fire insurance policies provided for herein. (It is your obligation to determine that such premiums are paid and that such policies are in effect.)

(h) Reservations and exceptions in Patents, such, for example, as oil or mineral reservations. [54]

SCHEDULE "A" - To be attached and made a part of Escrow #02013111-7

BUYER to take possession at close of Escrow.

It is understood and agreed between Seller and Buyer that there is an existing mortgage on Parcel 2 in favor of Federal Land Bank which will remain the obligation of the Seller of Parcel 2. Seller agrees to have this mortgage released before or at the time Buyer pays off the deferred balance due under said James Stewart Company - Cocke mortgage. Seller further agrees to provide Buyer with Partial Releases on 5-acre tracts as agreed to in the James Stewart Company - Cocke mortgage.

The terms of the purchase money mortgage are as follows: $64,000.00 on January 2, 1969, plus interest on unpaid balance from date of closing and the balance to be paid over a period of not more than 15 years in equal annual payments, including interest on all unpaid principal at the rate of six percent (6%) per annum from January 2, 1969, payable at the same time and including the regular annual payments, with the first such equal payment being due January 2, 1970. Buyer has the right and privilege to make additional payments at any time after January 2, 1969.

Seller agrees to execute and deliver to the escrow agent to be held in escrow, partial releases of mortgages in increments of 5-acre parcels, and the property may be released in the manner hereafter provided upon the following formula: $6,000.00 applied upon the principal for each acre

released paid upon the deferred balance due on the mortgage hereunder; EXCEPT that the property bordering on Priest Road a distance in depth of 600 feet shall bear a release price of $8,000.00 per gross acre. All releases are to be released in a contiguous manner, and the descriptions of said releases are to be furnished by a registered engineer. It is agreed between Seller and Buyer that the annual principal installments (EXCEPT the down payment of $64,000.00) shall apply toward the release price and the release prices paid for the release of land shall apply toward the next annual installment of principal. Except for annual payments of principal and interest, no interest charge shall be added to the release prices when Buyer obtains releases of lands hereunder.

These instructions and that certain Sales Agreement entered into October 9, 1968, between Buyer and Sellers constitute a binding agreement between Buyer and Seller for purchase and sale of the property described under the terms set forth herein.

The Broker's commission shall be 5% of the adjusted sales price, and shall be paid by Seller as follows: $10,000.00 upon the close of escrow, and one-half of the remaining balance to be paid from the principal payment due January 2, 1970, and the balance from the principal payment due January 2, 1971. The deferred commission shall bear interest under the same terms as the note and purchase money mortgage.

Sellers of Parcel 1 and mortgagees hereunder are Francis Cocke and Joan H. Cocke. Seller of Parcel 2 and mortgagee hereunder is Francis M. Cocke.

Escrow agent shall hold all releases of mortgage in ± 5 acre tracts to be executed by Seller or Sellers, depending on whether in Parcel 1 or Parcel 2, before close of escrow. Escrow agent shall keep account of all release credits, and shall apply any available release credit as instructed by Buyer, and turn executed releases over to Buyer as tracts are cleared by application of release credit, or by payment of the release price in the following manner: Tempe Branch, First National Bank of Arizona, shall hold for collection the note and mortgage. Buyer shall remit payments of principal and interest, and release payments to said Bank and shall designate tracts to be released, so that Bank may apportion said sums between the respective Sellers. Bank shall endorse said payments on the note as collected, and shall credit the amount thereof to one or both of Sellers as instructed by Sellers and shall issue a receipt to Buyer [5] for delivery to Escrow Agent. Escrow Agent shall thereupon deliver to Buyer the executed releases of the tracts paid for by Buyer, or shall record such releases upon instruction of Buyer.

APPROVED:

s/ Francis Cocke
FRANCIS COCKE, Seller

s/ Joan H. Cocke
JOAN H. COCKE, Seller

JAMES STEWART COMPANY
By
s/ Wallace O. Tanner
WALLACE O. TANNER, VICE PRESIDENT
Buyer

/s/ Arleigh R. Burton
ARLEIGH R. BURTON, Broker [56]

LEGAL DESCRIPTION:

PARCEL NO. 1:

That property situated in the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, more particularly described as follows:

BEGINNING at a point on the East boundary line of said quarter Section, where said boundary line intersects the middle of an irrigation ditch being 323 1/2 feet South of the Northeast corner of said Quarter Section; thence running is a Southwesterly direction, following the middle line of said ditch to quarter-quarter Section line running North and South through the middle of said quarter Section; thence South, along said quarter Section line, 1287 feet to the North line of Jenkins Ditch; thence East, along said North boundary line of said Jenkins Ditch to a point on the East boundary line of said quarter Section 519 1/2 feet North of the Southeast corner thereof; thence North, along said boundary line to beginning;

EXCEPT any portion which may lie within the right-of-way of the Jenkins Ditch.

PARCEL NO. 2:

That part of the Southeast quarter of Section Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, described as follows:

BEGINNING at the Northeast corner of the Southeast quarter of said Section 20 and running thence West, along the North line of said quarter section to the Northwest corner thereof; thence South, along the West line of said quarter section to the North bank of the Jenkins Ditch, a distance of 2090 feet, more or less; running thence East, along the North bank of the Jenkins Ditch to the quarter quarter Section line running North and South through the middle of said quarter section; thence North, along said quarter quarter section line to the center of the Cosner Ditch, also known as George Ditch, a distance of 1287 feet, more or less, running thence Easterly, along the middle of said Cosner Ditch and following the meanderings thereof to the East line of said quarter section; thence running North along said East line to the Northeast corner of said quarter section, a distance of 323 1/2 feet, more or less, to the point of commencement;

EXCEPTING THEREFROM, the following one-acre tract;

BEGINNING at the point of intersection of the North-South mid-section line of said Section 20 with the aforesaid Northerly right-of-way line of the Jenkins Ditch, said point being North 0 degrees 05 minutes 25 seconds East, 584.12 feet from the South quarter corner of said Section 20; thence North 85 degrees 05 minutes 25 seconds East, along said Northerly right-of-way line of Jenkins Ditch, a distance of 240.85 feet; thence South 89 degrees 22 minutes 35 seconds East, continuing along said Northerly right-of-way line, a distance of 131.69 feet; thence North 56 degrees 56 minutes 50 seconds West,

310.37 feet; thence North 34 degrees 59 minutes 16 seconds West, 150 feet; thence South 89 degrees 54 minutes 35 seconds West, 25 feet to the aforesaid North-South mid-section line of Section 20; thence South 0 degrees 05 minutes 25 seconds West, along said North-South mid-section line, a distance of 311.39 feet to the point of beginning, being that certain property named in Condemnation Proceedings in Cause No. 183278 in the Superior Court of the State of Arziona, County of Maricopa, entitled State of Arizona, Arizona State Highway Department, Plaintiff -vs- Francis M. Cocke, et al, Defendants, Lis Pendens of which was dated December 28, 1965, recorded January 7, 1966 in Docket 5874, Page 566; and

EXCEPT any portion of said property which may lie within the right-of-way of the Jenkins Ditch.

[57]
Transamerica Title Insurance Co.
P.O. Box 13028
Phoenix, Arizona

Re: Joan H. Cocke Trust No. 90497,
Escrow No. 02013111-7

Gentlemen:

Enclosed is a Special Warranty Deed from First National Bank of Arizona, as Trustee, to James Stewart Company which was prepared at the request of Joan H. and Francis M. Cocke.

Please place this deed in Escrow No. 02013111-7 in connection with the consummation of a sale of the subject property in accordance with escrow instructions executed by the parties and in accordance with further instructions governing the distribution of the proceeds of the sale to be furnished to your company, as escrow agent, by Joan H. Cocke and Francis M. Cocke.

Very truly yours,

FIRST NATIONAL BANK OF ARIZONA
By
/s/ George Hastings
Its: Assistant Trust Officer

[58] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

(PARCEL NO. 2), That part of the Southeast Quarter (SE¼) of Section Twenty (20) Twenty (20), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; described as follows:

Beginning at a point on the North line of said SE¼ of Section 20 which bears S.89° 43'55"W. 528.00 feet from the Northeast corner of said SE¼ of Section 20; thence S.0°20'41"E. 435.44 feet to the middle of the George Ditch; thence S.76°59'43"W. 236.29 feet along the middle of the George Ditch; thence S.67°40'43"W. 211.50 feet along the middle of the George Ditch; thence S.68°31'41"W.399.54 feet along the middle of the George Ditch to a point on the West line of the E½ SE¼ of said Section 20; thence S.0°07'25"E. 1381.50 feet along the West line of the E½ SE¼ of said Section 20 to a point on the North bank of the Jenkins Ditch; thence N.88°40'37"W. 463.68 feet along the North bank of the Jenkins Ditch; thence N.89°08'43"W. 481.97 feet along the North bank of the Jenkins Ditch; thence N. 0°51'17"E. 9.00 feet; thence N.56°56'50"W. 328.73 feet; thence N.34°59'16"W. 150.00 feet; thence S.89°54'35"W. 25.00 feet to a

point on the West line of said SE¼ of Section 20; thence N.0°05'25"E. 1757.73 feet along the West line of said SE¼ of Section 20 to the Northwest corner of said SE¼ of Section 20; thence N.89°43'55"E. 2121.23 feet along the North line of said SE¼ of Section 20 to point of beginning, containing 72.3284 acres within the limits of the City of Tempe and subject to existing rights of way and easements for roads, ditches, and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecilia J. Burton
Notary Public

My commission expires:
12/12/69

[59]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt Riber Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, on account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Controlled right of access to Interstate Highway referred to in Civil No. 183278; Lis Pendens recorded in Docket 5874, page 566.

6. Mortgage executed by Francis M. Cocke to The Federal Land Bank of Berkeley to secure an indebtedness of $_____

and other amounts payable thereunder, recorded April 14, 1966 in Docket 6004, page 97, which Francis M. Cocke has agreed to pay.

Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated _____, recorded _____ _____in Docket _____, page _____.

[60] WARRANTY DEED

For the consideration of Ten Dollars, and other valuable considerations,

hereafter called the Grantor, whether one or more than one, hereby conveys to

the following real property situated in Maricopa County, Arizona, together with all rights and privileges appurtenant thereto, to wit:

An undivided one-half (½) interest in 49.5023 acres of land within the limits of the City of Tempe described as follows:

(PARCEL NO. 1) That part of the East half (E½) of the Southeast quarter (SE¼) of Section twenty (20), Township one (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, described as follows:

Beginning at a point on the East line of said E½ SE¼ of Section 20, where said East line intersects the middle of the George Ditch, which bears S.0°20'17"E. 323.50 feet from the Northeast corner of said E½ SE¼ of Section 20; thence S.0°20'17"E. 1806.47 feet along the East line of said E½ SE¼ of Section 20 to the North bank of the Jenkins Ditch; thence N.88°40'37"W. 1333.01 feet along the North bank of the Jenkins Ditch to a point on the West line of said E½ SE¼ of Section 20; thence N.0° 07'25"W. 1381.50 feet along the West line of said E½ SE¼ of Section 20 to the middle of the George Ditch; thence N.68°31'41"E. 399.54 feet along the middle of the George Ditch; thence N.67°40'43"E. 211.50 feet along the middle of the George Ditch;

thence N.76°59'43"E. 375.20 feet along the middle of the George Ditch; thence N. 80°57'10"E. 195.15 feet along the middle of the George Ditch; thence N.75°14'43"E. 206.00 feet along the middle of the George Ditch to the point of beginning, subject to existing rights of way and easements for roads, ditches and public utilities; and subject to the encumbrances shown on the reverse side hereof:

Subject to current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances, liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record, the Grantor warrants the fee title against all persons whomsoever.

Dated this 30 day of December, 1968.

/s/ FRANCIS M. COCKE

STATE OF ARIZONA)
: ss.
County of Maricopa)

This instrument was acknowledged before me this 30 day of December, 1968, by

/s/ Mrs. Cecila J. Burton
Notary Public

My commission expires:
12/12/69

[61]

1. Taxes or assessments which are not shown as existing liens by the records of any taxing authority that levies taxes or assessments on real property or by the public records.

2. Easements, claims of easement or encumbrances which are not shown by the public records.

3. Unpatented mining claims, reservations or exceptions in patents or in Acts authorizing the issuance thereof; water rights, claims or title to water.

4. The liabilities and obligations imposed upon said land by reason of: (a) inclusion thereof within the boundaries of the Salt River Project Agricultural Improvement and Power District; (b) membership of the owner thereof in the Salt River Valley Water Users' Association, an Arizona corporation; (c) the terms of any Water Right Application made under the reclamation laws of the United States for the purpose of obtaining water rights for said land; and (d) subscription for capital stock of the Salt River Valley Water Users' Association, an account of land in Agricultural Improvement District No. 2 and Drainage District No. 2.

5. Mortgage executed by buyers M. Seth Horne and Maurine D. Horne to Francis M. Cocke to secure an indebtedness of $_____, and other amounts payable thereunder, dated_____, recorded_____in Docket _____, page_____.